United States Court of Appeals

for the Second Circuit

APPELLANT'S APPENDIX

75-1360

B P/S

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Appellee,

vs.

THOMAS ZAMMAS,

Appellant.

On Appeal from the United States District Court for the Southern District of New York

APPELLANT'S APPENDIX

Volume IV, pp. 951a – End

FRANKLIN, ULLMAN, KIMLER
ENTIN & KATZ, P.A.
Attorneys for Appellant
2020 North East 163rd Street
Suite 300
North Miami Beach, Florida 33162
(305) 949-5262

WYNN & ATLAS
230 Park Avenue
New York, New York 10017
(212) 679-9429

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THE COURT: Overruled.

A Generally the client might call his broker or an account representative and say I wish to sell so many puts on a particular stock for a period of time. In a stock or put of this sort which is traded over the counter, the Dean,Witter broker would wire out to our put and call operation, which at that time I believe probably was in San Francisco; they would go out into the open market and see whether there were buyers for puts of the amount that this client might want to sell.

They would then wire back to the account representative. The account representative would then tell his client I can sell so many puts at an approximate price for so long a time, and then the broker would sell the put for the client.

Q Does the broker become involved in any transaction other than simply as a broker?

A He is only acting as a broker, a go-between in effect.

Q Does the broker guarantee anything?

A Not at that time, no. He does his best to try and fill the customer's order.

Q When the put is sold, does the broker guarantee anything?

A Yes. He guarantees payment to the client for the value of the puts that have been sold.

Q Does he guarantee anything to the purchaser of the put?

A In effect, yes, he does. He guarantees to the purchaser that he has a right to deliver these stocks and receive payment for them any time during the life of the put at the price established.

Q Does the broker assume liability for that amount of money?

A His initial liability is there, yes.

MR. LOWE: I have no further questions.

CROSS-EXAMINATION

BY MR. ENTIN:

Q Mr. Mackey,you have been with Dean, Witter about five years you said?

A That's right.

Q Did you personally handle Mr. Zammas' account?

A No, I didn't.

Q Do you know Mr.Zammas?

A No, I do not.

Q Have you ever seen him before today?

A No, I do not know who he is.

Q Mr. Mackey, are puts and calls a normal thing in

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the stock market?

A They are generally a device used by sophisticated investors.

Q And done by every brokerage house?

A Almost every brokerage house would handle puts and calls, correct.

Q In the documents that you identified for Mr. Lowe, are there other transactions besides puts and calls?

A I believe there were. I don't remember.

Q That is Government documents 3A and 3B (handing).

A Yes, there are many other transactions involved.

Q And in stocks other than Power Conversion, is that correct?

A Correct.

MR. ENTIN: Nothing further.

MR. BERGER: No questions,your Honor.

MR. LOWE: I have nothing, your Honor.

THE COURT: Thank you. You may come down.

(Witness excused.)

MR. LOWE: Your Honor, at this time I would ask the jury be excused so we may handle legal matters prior to the appearance of the next witness.

THE COURT: The jury is excused for a few

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moments.

(Jury leaves the courtroom.)

MR. LOWE: Your Honor, I propose to ask the Court to grant our application to immunize the next witness. I have prepared for your Honor an application in that connection. The witness' lawyer is present in court, and I will establish the factual predicate for that application. I will bring the witness out.

S T E P H A N I E P A L U M B O, called as a witness by the Government, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LOWE:

Q Miss Palumbo, do you know the defendant in this case, Thomas Zammas?

A Upon advice of counsel I respectfully decline to answer the question on the ground that my answer may make me a witness against msyelf in violation of the rights guaranteed to myself by the Constitution of the United States, and especially the Fifth Amendment thereof.

Q Miss Palumbo, if I continue to ask you questions about Mr.Zammas, will you continue to refuse to answer the questions on the grounds stated?

A Yes.

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MR. LOWE: I would ask the witness be granted immunity under Section 6001 and 6002, Title 18, your Honor, and direct the witness answer the questions under penalty of contempt of Court.

BY THE COURT:

Q Miss Palumbo, do you have a lawyer?

A Yes.

Q What is his name?

A Mr. Richard Wynn.

THE COURT: Spell your name, please.

MR. WYNN: W-y-n-n, first name Richard.

THE COURT: Mr. Wynn, have you discussed with your client the proposed order by the Government directing the witness to testify, and being granted immunity?

MR. WYNN: Yes.

THE COURT: For use of this testimony?

MR. WYNN: That is correct, your Honor.

THE COURT: Miss Palumbo, the Government has advised the Court for an order directing you to testify in this case regarding questions which will be put to you about Mr.Zammas.

This order the Government is seeking is an order which will confer upon you a limited immunity with respect to your testimony, and that is that any testimony

which you give here regarding Mr.Zammas, cannot be later used against you in any proceeding against you, and in addition, the Government would not be able to use that testimony indirectly, that is, the Government would not be able to develop leads from your testimony which could then be used against you in a subsequent criminal prosecution.

Do you understand?

THE WITNESS: Yes, Madam.

BY THE COURT:

Q So that if I sign this order, it would direct you to testify truthfully, under oath, regarding what you know about Mr.Zammas or this proceeding which involves Power Conversion stock, do you understand?

A Yes.

Q As I have told you, when you testify, anything cannot be used against you in any subsequent criminal prosecution, do you understand?

A Yes.

Q And the Government couldnot use your testimony to develop leads as to other evidence against you. Do you understand?

A Yes.

Q But the order wouldnot protect you from any prosecution for perjury if you should testify falsely in

this proceeding, with respect to Mr.Zammas.

A Yes.

Q Have you discussed that withyour lawyer what I have just told you?

A Yes, Madam.

THE COURT: The Court will sign the order.

Is there anything further?

MR. LOWE: No, your Honor. At this time we could call in the jury.

THE COURT: Before we proceed, Miss Palumbo, the jurors are going to be called in. They are going to be sitting there and those lawyers at the second table are going to be sitting there. You are going to have to make an effort to throw your voice so that the lawyers and the jurors won't be saying to me they can't hear what you are saying.

Do you understand that?

THE WITNESS: Yes.

THE COURT: If we have to do that, your testimony is going to take twice as long as it would take, but the reporter will have to read every question and answer.

Do you understand?

THE WITNESS: I will be loud.

THE COURT: You throw your voice then as I am throwing mine. Do you understand?

THE WITNESS: Yes.

THE COURT: All right, bring in the jury.

MR. LOWE: Your Honor, when the jury comes in could we simply have the jury advised that the witness has been sworn?

THE COURT: Yes.

Do you want them advised of the granting of immunity?

MR. LOWE: I will advise that, in direct examination.

THE COURT: All right.

(Jury present.)

THE COURT: Ladies and gentlemen, this witness now seated in the witness box has already been sworn, so you may proceed now, Mr. Lowe.

MR. LOWE: Thank you,your Honor.

DIRECT EXAMINATION

BY MR. LOWE:

Q You have already stated it, but for the benefit of the jury, would you tell them what your name is, please.

A Stephanie Palumbo.

End 3A

Q Where do you live, Miss Palumbo?

A In Ft. Lauderdale, Florida.

Q Do you know the defendant in this case, Mr. Thomas Zammas?

A Yes, sir.

Q Do you see him in the courtroom?

A Yes, sir.

MR. ENTIN: We concede identity.

MR. LOWE: Thank you, Mr. Entin.

Q Did you know the defendant Thomas Zammas in the year 1972?

A Yes, sir.

Q What was your relationship with Mr. Zammas during that year?

A The gentleman is my boyfriend.

Q What is your current relationship with him?

A The same.

Q Are you testifying here voluntarily, Miss Palumbo?

A Yes, sir.

Q Did you refuse to testify here originally?

A By the fact that I have immunity, is that refusing?

Q Were you willing to testify absent an order

from the court?

A No, sir. You gave me immunity.

Q So that you are testifying here today after the government has applied for and obtained from the court an order granting you immunity from having this testimony against you in any way?

A Yes, sir.

Q You have previously indicated to us you were unwilling to testify unless that was done, is that correct?

A That's correct.

Q Are you testifying here voluntarily?

A If you are telling me that I'm not, no, sir.

THE COURT: was the witness subpoenaed?

MR. LOWE: Yes, your Honor, she was.

THE COURT: Why don't you ask her that.

Q Were you subpoenaed?

A Yes, sir.

Q Miss Palumbo, during the year 1972 did you have any brokerage accounts that you operated?

A There were brokerage accounts but I didn't operate them.

Q Were these brokerage accounts in your name?

A Yes, sir.

Q Who did operate them?

A Mr. Zammas.

Q Who paid for the transactions in them?

A Mr. Zammas.

Q Did you from time to time receive statements and other documents from brokerage firms?

A Yes.

Q Please keep your voice up so we can all hear you.

A Yes.

Q When you received these documents,did you speak to Mr. Zammas about them?

A Just to give them to him.

Q Did you give them to him?

A Yes, sir.

Q Did you ever have any conversation with him about what that was all about?

A Per se, exactly, you know, what is this and what is this. No, sir, I didn't, but I asked them what they were and he said they were brokerage accounts, you know, papers.

Q Were you employed in 1972?

A No, sir. Thatis the only year I've not

worked.

Q How did you meet your living expenses in that year?

A Mr. Zammas.

Q What business was Mr. Zammas in during the year 1972?

A I couldn't quote you a business.

Q Well, what did he do for a living?

A I don't know.

Q Did he have an office that he went to?

A No, sir.

Q Did he have anybody that he worked for?

A No, sir, not that I know of.

Q What did he do with his time?

A When he wasn't with me?

Q Yes.

A I don't know what he did when he wasn't with je.

Q Did you ever discuss with him what he did?

A We didn't talk about business.

Q Do you know where the money Mr. Zammas had, some of which he gave to you, came from?

A Yes, sir. I would imagine it would have come from stocks.

Q What leads you to conclude that?

A Just the papers that came to the house.

Q Were you in New York City with Mr. Zammas from time to time during 1972?

A Yes, sir.

Q Approximately how many times were you in New York with him during that year?

A I couldn't quote you a figure. I would come up maybe once a month, once every six weeks, sometimes just for the weekend, sometimes for a week.

Q What did Mr. Zammas do in New York?

A When he wasn't with me.?

Q We will start sith that.

A He would go to different brokerage firms and places. I usually didn't spend the day with him.

Q Whom did Mr. Zammas see when he was in New York?

A He saw a lot of people.

Q Specifically what persons do you recall that he actually saw in New York?

A As I told you before, I can see a lot of faces and if you would tell me names, I would tell you if I know those people but I can't associate names and

faces.

Q Do you know a person named William Rodman?

A Yes, sir.

Q Do you see him in the courtroom today?

A Yes, sir.

Q Would you point him out, please?

A Right there (indicating).

MR. BERGER: Identification is conceded.

Q Did Mr. Zammas see Mr. Rodman?

A Yes, sir.

Q Did you ever visit an apartment at 35th Street and Lexington Avenue, in Manhattan?

A Yes, sir.

Q Whose apartment was that?

A I don't know, you know, who rented it.

Q Who had the keys?

A We had a key. I don't know who else had a key.

Q Do you know a man named Eric Aiken?

A Yes, sir.

Q When and where do you first recall meeting him?

A I don't know exactly when it was, but I -- it had to be before 1972, and I don't know if I first

met him in Florida or if I first met him in New York. I couldn't tell you which.

Q Who introduced him to you?

A Well, I guess it would have had to have been Mr. Zammas.

Q Did there come a time when you met Mr. Aiken in a restaurant in Manhattan?

A Yes, sir.

Q Approximately when did that take place?

A Well, I wasn't sure but you told me it was in September.

Q Do you have any independent recollection of when that took palce?

A No, sir. I only have matches from where we went.

Q Do you remember what year it was?

A It was in '72.

Q What was the name of the place?

A The ground floor.

Q Who was there?

A Me and Mr. Zammas and Mr. Aiken and another lady. I don't know if it was his wife at the time or not, but it was another lady.

Q What was her name?

A I don't remember.

Q What time of day was it that you met?

A It was late in the evening.

Q What happened while you were there?

A We had dinner and the gentlemen got up from the table and left the table and they were gone for a while, and then Mrs. Aiken or whoever it was at the time, she got very upset because they didn't come back to the table, and she got very loud and she said -- she sent a waiter -- and that's why the evening stands out to me, is because she made a fuss and I got embarrassed -- and she sent a waiter into the bathroom to look for them and she couldn't find them. And then she got up to pay the check and I don't remember if she left before they came back or if she was still there, but I just remember I was very embarrassed because she was very loud.

Q Did Mr. Zammas tell you anything about why you were meeting those people at that time?

A No, sir. I don't remember if it was because I had come up laye that evening, if I had come up on the plane that day, and it was after I got in from the plane and we went. I honestly don't remember. Or because they had been somewhere and we met them after-

wards, I don't know.

Q I think you might have misunderstood the question.

Did Mr. Zammas tell you anything about why he was meeting with Mr. Aiken and this woman?

A No, sir.

Q I can't hear you.

A No, sir.

MR. LOWE: I have no further questions.

MR. ENTIN: No questions, your Honor.

MR. BERGER: No questions, your Honor.

THE COURT: Any redirect?

Thank you. You may come down.

(Witness excused.)

THE COURT: Do you have any other witnesses?

MR. LOWE: No, your Honor. May I have a minute and I will be prepared to make a statement for the record?

THE COURT: All right.

MR. LOWE: The government rests.

THE COURT: We are going to recess now until 10 o'clock tomorrow morning.

The jury is excused until 10 o'clock tomorrow morning.

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(The jury left the courtroom.)

THE COURT: The government having rested, are there any motions?

MR. BERGER: Your Honor, would it be possible to reserve our motions after the close of the entire case?

MR. ENTIN: Yes, your Honor, without waiving same?

MR. LOWE: Your Honor, with the exception that, if the motions are made at the close of the entire case, they must be made on the record of the entire case and may no longer be directed solely to the government's case. Any motion directed to the government's case must be made now, at a time perhaps when the government would have an opportunity to repair, if there is any need to do so. Otherwise, any evidence developed during the defense case would be considered along with the evidence of the government's case in weighing any motion to dismiss.

THE COURT: Do you agree, Mr. Berger?

MR. BERGER: I will make one general motion, your Honor.

I move for a directed verdict of acquittal based on the fact the government has failed to establish

a case beyond a reasonable doubt as to Mr. Rodman. I will reserve my other motions, your Honor.

THE COURT: Just a moment. If you want to make the motions 11 at the end of the entire case, you can do that. If you want to make them now, I will rule now.

The motion you just made now is denied.

Do you want to elaborate on it for the record.

MR. BERGER: I will make my other motion at the close of the entire case.

THE COURT: Do you have any motion, Mr. Entin?

MR. ENTIN: I would make a motion similar at this time. I would move for a directed verdict of acquittal as against Mr. Zammas on the ground the government has failed to establish each and every material allegation charged against Mr. Zammas in counts 1 through 12 of the indictment, inclusive.

THE COURT: Do you want to elaborate on it?

MR. ENTIN: Not at this time, your Honor.

THE COURT: Of course, during the course of the government's case the court accepted a great deal

of testimony subject to connection. That is, to the government putting in evidence, independent evidence aside from any hearsay statement testified to, which would show that a particular defendant participated, as the government claims, in a plan and scheme to defraud. Of course, there is evidence with respect to that, that is, independent evidence, that the defendant Zammas participated in a scheme to defraud by use of the mails as charged in count 1, and that he by use of the mails caused to be published and circulated an article in the September 29, 1972 issue of Value Line Selection and Opinion, as charged in counts 7 through 12.

With respect to the mail fraud case, I intended to say counts 1 through 6. That is, evidence in which the court finds that defendant Zammas, aside from any hearsay statement, participated in a plan and scheme to use the mails to defraud as alleged in counts 1 through 6, and as alleged in counts 7 through 12, that he used the mails and caused an article to be published and circulated as charged in those counts.

The same with respect to the defendant Rodman, that is, there is independent evidence to show, quite aside from any hearsay statement, that he participated in a scheme to use the mails to defraud as charged in

counts 1 through 6, and that by use of the mails caused to be published and circulated an article on September 9, 1972, in Value Line Selection and Opinion, as charged in counts 7 through 12.

Of course, therefore the jury will be instructed that they can consider all the evidence in the case in determining whether the derendants are guilty as charged beyond reasonable doubt with respect to all of these counts.

With respect to counts 1 through 6, 7 through 12, the addressees, I gather, are identical, Mr. Lowe?

MR. LOWE: Yes, your Honor, they are.

THE COURT: And we have had testimony with respect to each of the addressees with respect to the receipt of the article by mail.

So the motions made by the defendants without elaboration at the end of the government's case are both denied.

Tomorrow morning, Mr. Berger, you are to proceed with your witnesses. How many do you have?

MR. BERGER: Four, your Honor.

THE COURT: How many do you have, Mr. Entin?

MR. ENTIN: At this time, your Honor, we will have one or two. We won't know until tonight whether we will have a second witness. We will definitely have one.

THE COURT: Did you gentlemen hand in your requests of charge on Friday?

MR. ENTIN: Yes, your Honor.

THE COURT: Did you give them to the clerk?

MR. ENTIN: I believe we delivered them.

MR. KIMLER: Delivered directly to your chambers.

THE COURT: The same for you, Mr. Berger?

MR. BERGER: Yes, one set, your Honor.

MR. ENTIN: We joined.

MR. BERGER: With regard to your Honor's rulings, on the acceptance of the hearsay evidence, I wish to except to that ruling specifically on the law, meaning that the burden of proof to establish the connection as set forth in cases in the Second Circuit was insufficient in that the burden of proof as to participation in the scheme must be beyond a reasonable doubt, and that there has not been proof beyond a reasonable doubt as to participationin the scheme, and therevore the hearsay should not be admissible

against Mr. Rodman.

THE COURT: We will recess until 10 o'clock tomorrow morning.

(Adjourned to Tuesday, August 5, 1975, at 10:00 a.m.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Alan Umbogy (Resumed)		747	785C	785J
Dan A. J. Lettieri	797	800		
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I (We) hereby certify that the foregoing is a true and accurate transcript, to the best of my (our) skill and ability, from my (our) stenographic notes of this proceeding.

Robert H. Mace
Official Court Reporter
U. S. District Court

Herbert H. Tropp

hpb 926

United States of America

vs. 74 Cr. 987

William Eric Aiken, et al

New York, New York.
August 5, 1975 - 10:00 A.M.

(Trial resumed.)

(In open court; jury absent.)

MR. ENTIN: Your Honor, before calling the jury, I would, prior to putting on the defense case at this time, renew all motions made previously for severance and mistrial by the defendant Zammas during the course of this case, and all motions which had previously been made whether ruled upon by the Court or not.

THE COURT: I believe I ruled on all of your motions, and if you are renewing them, they are similarly denied. I don't recall any that were granted,do you?

MR. ENTIN: No,your Honor,I do not. In case I inadvertently didn't hear.

MR. BERGER: For purposes of the record, defendant Rodman joins in that motion.

THE COURT: All right, bring in the jury.

(Jury present.)

THE COURT: Good morning, ladies and gentlemen.

You will recall last evening theGovernment rests its case, and at this time we will proceed with the defense case.

Are you ready to proceed, Mr.Berger?

MR. BERGER: Yes, your Honor, I am.

THE COURT: Call your first witness.

MR. BERGER: Yes. Mr. Peter Shaeffer.

P E T E R S H A E F F E R, called as a witness by the defense, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BERGER:

Q Mr.Shaeffer, how are you employed?

A I am employed as an attorney for the Securities and ExchangeCommission.

Q When did you first enter into that employ?

A I believe it was October 16, 1972.

Q And in your employ, did you participate in the investigation of the Power Conversion stock?

A Yes, I did.

Q Did you have an opportunity to inspect the books and records of C.I. Oren?

A I have looked at some of the books and records of C.I. Oren,yes.

Q Did those books and records reflect the names of customers of Mr. Rodman?

A I can answer that. I don't know who specifically the customers of Mr. Rodman are.

MR. LOWE: Your Honor, I am going to object to questioning Mr. Shaeffer about what is in the books and records of C.I. Oren. The books and records of C.I. Oren are availab,e to subpoena, could be produced and therefore should be produced as the best evidence of what they represent.

Testimony from a person who perused some of the books and records of C.I. Oren is inappropriate at this time.

MR. BERGER: Your Honor, the books and records that I am referring to have already been put into evidence by the Government.

THE COURT: You are referring to Government Exhibit --

MR. LOWE: 16, I suppose, your Honor.

THE COURT: Are you referring to Government Exhibit 16?

MR. BERGER: Yes, your Honor.

THE COURT: Are you asking this witness whether he perused those?

MR. BERGER: When he perused Government Exhibit 16.

THE COURT: You can ask him that.

Q Have you perused Government Exhibit 16?

A Yes.

Q Does that exhibit contain customers of Mr. Rodman?

A As I indicated, Mr.Berger, I do not know who the customers of Mr. Rodman are or were.

Q Did you know that Mr. Rodman had customers?

A Certainly of my own knowledge I do not know that.

Q Did you interview any of the customers of Mr. Rodman?

A It is possible that I did. I don't recollect, however.

MR. BERGER: No further questions, your Honor.

THE COURT: Any cross-examination of this witness?

MR. LOWE: Nothing, your Honor, from me.

MR. ENTIN: Nothing from defendant Zammas.

THE COURT: Thank you. You may step down.

Do you have ancther witness?

MR. BERGER: I call Mr. Larry Lindsay.

MR. LOWE: May we approach the bench?

THE COURT: Yes.

(At the side bar.)

MR. LOWE: Your Honor, Mr. Lindsay has already been on the stand. Mr.Berger could have asked him anything he wanted to when he was on the stand, and I don't think he should be calling him now about something he forgot or left out or whatever during the time he was on the stand during the course of the Government's case.

MR. BERGER: Your Honor, Mr. Lindsay was called to produce a record. I didn't wish to go beyond the scope of the direct and my questions to Mr. Lindsay have nothing to do with the introduction of the records. He is called as my witness.

THE COURT: All right. You may proceed.

(In open court.)

L A W R E N C E L I N D S A Y, recalled as a witness by the defense, having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. BERGER:

Q Mr. Lindsay, how are you employed?

A Securities investigator of the Securities and Exchange Commission.

Q When did you first go into that employ?

A In June of this year.

Q Do you know the defendant William Rodman?

A Yes, I do.

Q How long do you know him?

A Around eight years.

Q How do you know him?

A I was manager of a margin department in a brokerage firm and Bill had worked for me there and through the years I knew him. I also worked with him at C.I. Oren & Company.

Q Have you been fairly close to Mr. Rodman during the last eight years?

A During the first few years,yes, because he worked there and then there was a gap in between and then I worked for C.I. Oren.

Q Who got you your job at C.I.Oren?

A Bill Rodman.

Q Has Mr.Rodman ever been your customer's man?

A No.

Q Did he ever recommend stocks to you or your sister?

A Yes.

Q Did he discuss stocks with you?

A Yes.

Q During the latter part of August and September

of 1972, were you employed by C.I. Oren?

A Yes.

Q Did you have occasion to discuss securities with Mr. Rodman while you were employed at C.I.Oren?

A No.

Q Did Mr. Rodman ever tell you that an article was coming out in Value Line in the future describing Power Conversion?

A No.

MR. BERGER: No further questions.

THE COURT: Any cross-examination?

MR. ENTIN: None by defendant Zammas,your Honor.

MR. LOWE: I have some, your Honor.

CROSS-EXAMINATION

BY MR. LOWE:

Q Mr. Lindsay, you testified when Mr. Berger asked you whether you ever discussed securities with Mr.Rodman at C.I. Oren and you said no.

A I thought that was for personal --

Q Did you discuss secu-ities with Mr. Rodman while you were at C.I.Oren?

A Regarding the firm's securities, yes.

Q It was a necessity that you do that, was it not, to do your job?

A Yes.

Q And among other things you discussed the security Power Conversion, did you not?

A Yes.

Q And as a matter of fact, Mr. Rodman was very active in that stock, was he not?

A Yes.

Q How many occasions did you have to discuss that particular stock with him?

A A number of occasions.

Q What was the nature of those conversations?

MR. BERGER: Your Honor, I object. No predicate for time and place.

THE COURT: The question now is what was the nature.

MR. LOWE: Of a series of conversations, your Honor. I am not asking for specific conversation. I am asking for the nature of the conversations in general.

THE COURT: All right.

A Whenever there were any trades that I didn't have, and brokers were coming in with them or the National Clearing Corporation was calling up on them, I had to go upstairs to talk to Mr. Rodman or Mr. Orenstein in regard to those transactions.

Q What do you mean by a trade you didn't have?

A A broker would come in to make a delivery to me and I didn't know it.

Q What do you mean you didn't know it?

A I had no trade ticket for that transaction.

Q And isn't it a fact, Mr. Lindsay, that the reason you didn't is that Mr. Rodman would accept orders on the telephone and make no record of them?

MR. BERGER: Objection,your Honor, as to whether the defendant, Mr. Rodman, ever made such a statement to Mr. Lindsay. No proper predicate.

THE COURT: That is not the question. Read the question, Mr.Reporter.

(Question read.)

MR. BERGER: Same objection,your Honor. There is no predicate to show that Mr. Lindsay had personal knowledge that Mr. Rodman accepted orders on the telephone and didn't make a record of it.

THE COURT: Let's question the witness whether he knows of his own knowledge whether in fact that occurred.

MR. BERGER: Fine, your Honor.

A I am sorry, I am confused on that type of a question now as to knowing what the Judge said or what you said.

Q Did you have occasion to discuss with Mr. Rodman the fact that people were arriving at your office --

A Yes.

Q -- with what they thought were trades, asking for money --

A Right.

Q -- of which you had no record?

A Yes,that's right.

Q You did have occasion to discuss that with Mr. Rodman?

A Yes.

Q What did Mr.Rodman tell you about that?

A He had told me to send a runner up to him. A runner is the person making delivery from the other firm.

Q He didn't tell you to send the man away because there was no trade, did he?

A No.

MR. ENTIN: Your Honor, may I have a limiting instruction regarding this?

THE COURT: I have already ruled on certain matters.

MR. ENTIN: Your Honor, this doesn't relate to anything presented in the case in chief. I don't even know what stock is being described here.

THE COURT: Overruled.

Q We are talking about Power Conversion, are we not?

A Yes.

Q Me. Lindsay, October 6, 1972, the stock of Power Conversion plummeted that day to $5 a share from a price near 40, is that not correct?

A Yes, that is correct.

Q That happened within a 24-hour period, did it not?

A Yes.

Q How many people were at your office on the 5th and 6th of October seeking to be paid for stock they believed they had sold to C.I. Oren?

MR. BERGER: Objection , your Honor. Immaterial, irrelevant, outside the scope of the direct.

THE COURT: Overruled.

A There were a number of them. The exact number I don't know. There were more than what would be considered normal. There were people standing all over theoffice. Because of that day, everything actually fell apart.

End 1A

Q Did you have occasion to discuss with Mr. Rodman what happened that day and the day before?

A In regards to the runner coming?

Q In regards to all of those people, the number of people that you say were there looking to be paid.

A No. I just didn't know what happened. I was sort of in shock myself.

MR. LOWE: I have no further questions.

REDIRECT EXAMINATION

BY MR. BERGER:

Q Mr. Lindsay, Mr. Rodman was a customer's man, was he not?

A Yes.

Q Did he have various csutomers that purchased Power Conversion stock?

A Yes.

Q Mr. Rodman never told you that he put through a sale of a purchase of Power Conversion stock but didn't write a ticket, did he?

A No, he never told me that.

Q Many times a different brokerage firm can send up stock for someone's account without a purchase, isn't that correct?

A Yes, that happens occasionally.

Q There can be mistakes?

A Yes.

Q Was Mr. Rodman in shock on October 6, 1970?

MR. LOWE: I object to leading, your Honor.

THE COURT: Yes.

Q What was Mr. Rodman's condition on October 6, 1972?

A I don't know.

Q Did you ever hear Mr. Rodman tell a customer that an article was coming out in Value Line?

MR. LOWE: I object to leading, your Honor.

THE COURT: It has been asked and answered before.

MR. BERGER: Mr. Rodman had never told that to Mr. Lindsay. I will withdraw the question.

Thank you, your Honor.

THE COURT: Anything further?

MR. LOWE: I have nothing further.

THE COURT: Step down. The witness may come down.

(Witness excused.)

THE COURT: Do you have another witness?

MR. BERGER: Yes, your Honor.

Mr. Arthur Levine.

A R T H U R L E V I N E, called as a witness by defendant Rodman, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BERGER:

Q Mr. Levine, do you know Mr. Rodman, yes, I do.

Q Do you see him here in the courtroom?

A Yes, I do.

Q How long have you known Mr. Rodman?

A I met Mr. Rodman in 1971, I believe.

Q What business are you in, Mrl Levine?

A Real estate, mortgages, some private investing.

Q How long have you been in that business?

A Over 20 years.

Q Have you ever been arrested?

A No.

Q Have you ever been accused of a crime?

A No.

Q When you say you were in real estate over 20 years, what type of real estate, what type of business, were you in?

hpa Levine-direct

A Well, I owned a major part of the corporation that owned 333 Seventh Avenue, we had investments in Baltimore, Philadelphia, Florida.

Q Are you marrked?

A Yes.

Q Do you have any children?

A Four children.

MR. LOWE: Your Honor, I'm kind of puzzled as to the relevance of the life history of Mr. Levine.

THE COURT: Yes, how is it relevant how many children this witness has?

Q Did there come a time when Mr. Rodman became your customer's man?

A Yes.

Q When was that?

A When I first met him, in 1971.

Q Was he your customer's man in 1972?

A Yes.

Q Did you ever buy Power Conversion stock?

A Yes.

Q From Mr. Rodman?

A Yes.

Q Did Mr. Rodman ever tell you that an article would be coming out in Value Line describing Power Conver-

A Yes, I did.

Q How many shares did you buy?

A I bought 500 and my company bought a thousand.

Q So you had some interest in 1500 shares of that stock, is that right?

A No. I bought it from time to time after that and sold it from time to time.

Q As of the day of the public offering, you had an interest in 1500 shares of that stock, did you not?

A Yes, I did.

Q And now you are indicating that from time to time thereafter you both more, is that correct?

A That's true.

Q Did you buy and sell from time to time or did you just buy and then at one point sell?

A No. I bought and sold from time to time.

Q Did you make money?

A No, I lost money.

Q Yhe stock you bought at $5 a share, when did you sell that stock?

A I sold that in 1972.

Q Approximately how long after you bought it

sion?

A No.

MR. BERGER: No further questions, your Honor.

CROSS EXAMINATION

BY MR. LOWE:

Q Did you ever sell Power Conversion stock through Mr. Rodman?

A Yes.

Q Did you get paid for it?

A Yes.

Q When?

A At the time that I was supposed to get paid for it.

Q Approximately when in 1972 did you have the sale transaction?

A I don't recall.

Q Let's see if we can work it out.

When did you buy it?

A I bought Power Conversion when it first came out -- I don't remember the exact date but when it first came out.

Q Did you buy it at the initial public offering price at $5 a share?

did you sell it?

A I don't recall the exact date I bought it, but when the stock came out you would probably know the date, I don't recall the date, but I had sold it in October of 1972.

Q What day in October of 1972 did you make that sale?

A I sold it the day they stopped trading the stock.

Q October 6th?

A I don't remember the exact date.

Q What was the price at which you sold it?

A I don't recall the exact price but I would say somewhere around $30.

Q The stock you bought at $5 a share you sold for somewhere around 30?

A Some stock I had at $42 and $44 a share and I sold that at 30 as well.

Q How much stock did you have at $42 and $4 a share?

A I had 500 shares.

THE COURT: Are you talking about Power Conversion?

THE WITNESS: Yes, I am.

Q Mr. Levine, do you have any record of these transactions?

A I assume my accountant has.

Q Did anybody ask you to bring them with you when you came to testify today?

A No.

Q Pardon?

A No.

Q Approximately how many shares did you sell on that day trading stopped in the stock?

A 2000 shares.

Q Prior to that time how many shares had you sold?

A I don't remember offhand, but I traded the stock, I would say, approximately , approximately another thousand shares.

Q At what price was the sale of that other thousand?

A I don't remember.

Q Was it 40?

A You are talking about two and a half years ago. I don't remember the exact prices that it was sold.

Q Let's get an approximate price. Was it

20?

A I don't remember. I believe it was in the 30s, high 30s. I really don't know.

Q Did you follow that stock, Mr. Levine, as it was traded from day to day, or at least from time to time?

A From time to time I did.

Q Isn't it a fact, Mr. Levine, that within roughly a month or so after the stock became public it traded anywhere from $35 to $40 a share until the first week in October of 1972?

A I don't know the exact prices at the given times but I know the stock moved very rapidly.

Q And it was up in the high 30s and low 40s for a substantial period of time that it was actually trade, was it not?

A Yes.

Q And your basis for 1500 shares of that stock was $5 per share, is that right?

A That's true.

Q During the period of time it was trading you bought and sold roughly a thousand shares?

A Somewhere in that neighborhood, I believe.

Q Just on that thousand shares that you bought and sold during the time the stock was traded, did you make a profit or a loss?

A I don't remember. I believe once I made a profit and I think once I made a loss. I really don't recall.

Q Then you sold the stock on the last day that it was trading, you sold 2000 shares that day; is that right?

A That's right.

Q Of which 1500 shares had a basis of $5?

A That's true.

Q And 500 had a basis of the low 40s, is that right?

A I believe so.

Q And you sold somewhere in the 30s?

A I believe so.

Q That's merely a question of arithmetic, Mr. Levine.

Did you make a profit or not?

A Yes, I made a profit.

Q But when I first asked you, you said you made a loss, didn't you?

A Well, on Power Conversion, if you would take

the overall picture, I believe there is a profit involved.

Q Thank you.

The sales you made on the last day, where were they made?

A Graham, Loving & Company.

Q Through whom were they made?

A Graham, Loving & Company.

Q What specific individual did you deal with?

A I don't recall the individual's name. They had one man up there who was selling the stock. There was a fellow by the name of George Georges that I knew, and he directed -- what do you call it -- the broker to sell the stock.

Q How did you come to decide to sell the stock on the last day of trading?

A Very simple. The day before George Georges called me up at my home and told me the stock had fallen out of bed, that I should be up in his office the first thing in the morning. And I said, "What do you mean, had fallen out of bed?" and he said, "The stock dropped drastically, I don't know what the hell is wrong," and he said to come and visit him in his office the following morning.

Q Did you initially buy the stock through Mr.

Rodman?

A Yes, I did.

Q Did you, on the night that Mr. Georges called you up or on the next day, call Mr. Rodman to find out what was happening?

A I tried to reach Mr. Rodman but he was unavailable.

Q How many times did you try to reach Mr. Rodman either the night before the day you actually made the sale?

A I didn't try to reach him the night before I tried to reach him that morning and couldn't reach him.

t2a

Q How many times did you try?

A Perhaps twice. I don't recall. I would say at least twice.

Q Were you paid by Graham, Loving in the ordinary course of business, within the ordinary period of time within which sales transactions are paid for?

A No.

Q How long did it take for you to get paid on that sale?

A I haven't been paid as yet.

Q Pardon?

A I haven't been paid as yet.

Q Mr. Levine, when I asked you one of the first questions I asked you, I asked you whether you had been paid and you said you had been.

A I don't believe that was your question. If you would have asked me that question, I would have answered.

Q I won't ask the reporter to read my questions and your answers, Mr. Levine.

The fact is you have not been paid, isn't it?

A That's true.

Q Have you spoken to Mr. Rodman about why you didn't

get paid?

A No, I haven't.

Q Didn't you think it would be something you ought to inquire into?

A No, not through Mr. Rodman.

Q Didn't you know that Mr. Rodman was a particularly knowledgeable person about the stock of Power Conversion and trading of that stock?

MR. BERGER: Objection. May I have a side bar, your Honor?

THE COURT: Yes.

(At the side bar.)

MR. BERGER: Your Honor, what Mr. Rodman knew or did not know is irrelevant. Mr. Levine was not paid because of the fact the brokerage house through whom the sale was made went out of business, went bankrupt, and therefore he was unable to be paid.

MR. LOWE: Mr. Berger, I have a good-faith reason to believe that the reason this witness did not get paid is because when Graham, Loving tried to sell that stock they sold it the same as many other people, to C. I. Oren or to Havener at Mr. Rodman's instructions, where all such trades were dishonored.

MR. BERGER: Then ask him whether he

knows these facts and whether he went ahead and had an arrangement with Mr. Rodman like that.

MR. LOWE: I asked him whether or not he spoke to Mr. Rodman about why he didn't get paid. You have objected. I am explaining to you what I am leading to.

MR. BERGER: He answered the question. He said he couldn't reach him. Where are you going now?

MR. LOWE: I have now asked him whether has spoken to Rodman subsequently as to why he didn't get paid.

MR. BERGER: Your Honor, whether --

THE COURT: The question of the witness now is whether he knew that Rodman had a substantial interest in this stock.

MR. LOWE: Substantial knowledge, because I am questioning why he didn't speak to Mr. Rodman.

THE COURT: All right, you can ask him that.

MR. ENTIN: Your Honor, at this point it appears that Mr. Berger may have opened the door to a manipulation of Power Conversion through no fault of the defendant Zammas. It appears to me as though Mr. Lowe

is driving through that door.

I find this highly prejudicial to the defendant Zammas and move again for severance.

THE COURT: Motion denied.

(In open court.)

BY MR. LOWE:

Q Mr. Levine, did you ever ask Mr. Rodman whether he was in any way responsible for the fact that you didn't get paid?

A No, I did not.

Q So that you do not know whether or not he was, do you?

A I beg your pardon?

Q You do not know whether he was responsible, do you?

MR. ENTIN: Objection, your Honor. It calls for a conclusion of the witness that he is not qualified to respond to.

THE COURT: I don't understand the question, Mr. Lowe.

Q The question is: Mr. Levine, you do not know whether Mr. Rodman was in any way responsible for your not being paid, do you?

MR. ENTIN: My objection stands.

A I don't understand the question.

MR. BERGER: Same objection.

THE COURT: Overruled.

A I don't understand the question. Can you rephrase it in some way.

MR. LOWE: I will withdraw the question and rephrase it.

Q Do you have any personal knowledge as to whether or not Mr. William Rodman was responsible in any way for your failure to be paid for that sale of Power Conversion stock on the last day?

A I would say I don't know. I don't see how.

Q Have you filed a claim to be paid?

A Yes, I have.

Q With whom?

A I don't know. My attorneys handle that.

Q Have you filed a lawsuit against Graham, Loving?

A No.

Q Have you filed a lawsuit against anyone in that connection?

A No.

Q Have you filed a claim with a governmental --

A I don't know. A claim has been filed by my attorney with SIPC, I believe.

Q That is the Securities Investor Protection Corporation, is it not?

A Right.

Q Have you been paid by them?

A No.

Q Do you expect to be?

A I hope to be.

Q Do you know where the money comes from to pay you by the Securities Investor Protection Corporation?

MR. BERGER: Objection, your Honor. That is irrelevant.

MR. LOWE: I withdraw the question. I have no further questions.

THE COURT: Nothing further.

MR. BERGER: One question, your Honor.

REDIRECT EXAMINATION

BY MR. BERGER:

Q Mr. Levine, did you lose any money with Mr. Rodman while you were trading with him?

A Yes.

Q Approximately how much?

A $100,000.

Q Do you hold any animosity to Mr. Rodman?

A No.

MR. BERGER: No further questions.

THE COURT: Anything further?

MR. LOWE: I have nothing further.

MR. ENTIN: I have nothing, your Honor.

THECOURT: Thank you. You may come down.

(Witness excused.)

MR. BERGER: Your Honor, the defendant Rodman rests.

THE COURT: Do you have anything, Mr. Entin?

MR. ENTIN: Yes, your Honor. We call Edward J. Crooker.

E D W A R D J. C R O O K E R, called as a witness by defendant Zammas, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. ENTIN:

Q Mr. Crooker, where are you presently employed?

A Arnold Bernhardt & Company.

Q They are the publishers of Value Line Selection and Opinion?

A That's correct.

Q How were you so employed in September of 1972?

A As comptroller.

Q Mr. Crooker, did you prepare a list of the officers and directors of Arnold Bernhardt & Company in September of 1972?

A I did.

MR. ENTIN: Would you mark this.

(Defendant Zammas Exhibit L marked for identification.)

Q Did you prepare this list which is now Defendant's Exhibit L for identification from the books and records of Arnold Bernhardt & Company?

A Yes, sir.

Q And does it truly and accurately reflect the officers and directors of Arnold Bernhardt & Company in September of 1972?

A Yes, it does.

Q And that is based on your own personal knowledge as well as the books and records?

A Yes, sir.

MR. ENTIN: Any objection, Mr. Lowe?

MR. LOWE: May I see it?

(Handed to counsel.)

MR. LOWE: I don't see that this information has any relevance to this case. I therefore object to the admission of it in evidence.

THE COURT: What is its relevance?

MR. ENTIN: I would like to proffer it at the side bar, your Honor.

(At the side bar.)

MR. ENTIN: With regard to count 1 of the indictment, counts 1 through 6, mail fraud, Mr. Lowe has argued the public had a right to rely on disclosure on any gratuity that was paid to Mr. Aiken. It is our position, and we will bring it out, that the public was on notice not to rely on any disclosure from an employee of Value Line and would only rely on disclosure of officers and directors.

THE COURT: Which count of the indictment are you talking about?

MR. ENTIN: The scheme and artifice to defraud the consumer, which Mr. Lowe had argued they were relying to get a reliable, unpurchased article.

We will show the public was on notice and

the only interest divulged in Value was not employees'. Employees' interests or conflict would be handled through the internal mechanism of Arnold Bernhardt & Company and would not be disclosed in the paper.

THE COURT: I haven't the vaguest idea what you are talking about.

MR. LOWE: Your Honor, he is making a legal point I think which is in fact that the public did not have the right to rely on the independence and objectivity of the Value Line staff. It seems to me the question of whether the public had a right to rel on that is a question of law. It is not for this witness to say --

MR. ENTIN: He is not saying this. We are not calling him for that. We are asking him to identify the officers and directors, your Honor, and then we will ask him to identify a public policy that is published periodically in Value Line and was published in Value Line in 1972, telling the public exactly what they could expect from the publication in terms of disclosure, no more and no less, which goes directly to Mr. Lowe's entire case on mail fraud.

THE COURT: What is that statement?

MR. ENTIN: A good-faith disclaimer. It

says specifically, your Honor, that the only disclaimer that will be published in Value Line as to an interest of any person in Value Line will be those of officers and directors, that any employee that has a conflict of interest, paid gratuities, stockholdings, anything else, is reported to their legal counsel and internally the conflict is resolved but not disclosed to the general public, unless it is an officer and director, published several times a year, and he can identify this as being the general policy.

MR. LOWE: I withdraw my objection.

(In open court.)

THE COURT: Let Defendant's Exhibit L be received.

(Defendant Zammas Exhibit L was received in evidence.)

Q I show you Defendant's Exhibit I, which is already in evidence, and ask you if you can identify it.

A This is an issue of Selection and Opinion dated October 16, 1970.

THE COURT: Keep your voice up so the lawyers in the back can hear you and all the jurors.

Q I ask you turn to the back page of that

exhibit.

A Yes, sir.

MR. LOWE: Before we get any further, may I ask that the reporter read or perhaps the witness could simply repeat. I missed the date of the publication.

THE WITNESS: October 16, 1970.

Q Does there appear there on the back, Mr. Crooker, a good-faith disclaimer?

A Yes, sir.

MR. LOWE: Your Honor, if Mr. Entin wishes to offer this in evidence I probably won't object. I --

THE COURT: It is already in evidence.

MR. ENTIN: It is in evidence, your Honor, but --

MR. LOWE: I'm sorry. I didn't realize it was. I withdraw the objection.

Q Mr. Crooker, this good-faith disclaimer, as published on the back of this 1970 copy of Value Line Selection and Opinion, is it the same as was published consistently throughout 1972?

A Yes.

Q Is it the same as was published in September

of 1972?

A Yes, sir.

Q And at all times has this been the public policy of Arnold Bernhardt & Company?

A Yes.

MR. ENTIN: No further questions, your Honor.

MR. LOWE: May I have the document, please?

MR. ENTIN: Certainly (handing).

CROSS EXAMINATION

BY MR. LOWE:

Q This is rather a lengthy statement of policy by Arnold Bernhardt & Company, is it not?

A Yes.

Q Is Arnold Bernhardt & Company a government agency?

A No.

Q Is it an affiliate with any government agency?

MR. ENTIN: Objection. Outside the scope of direct and immaterial.

THE COURT: Overruled.

Q Is it an affiliate with any government agency?

A No, sir.

Q Does it have any legislative or law-making

powers?

A No, sir.

Q As a company, does it have any right to violate the laws of the United States?

A Absolutely not.

Q Does it have any right to make a policy which is in violation of the laws of the United States?

A No, sir.

Q I am going to ask you, Mr. Crooker, is there anything in that declaration of public policy which says that the public must run the risk that --

MR. ENTIN: Objection. The document speaks for itself. The witness has not been called to interpret what is in the document. They jury can read it for itself --

MR. LOWE: I didn't finish the question.

Q Mr. Crooker, is there anything in that statement of public policy by Arnold Bernhardt & Company to tell the public, the subscribers and whoever might read that publication, that they must run the risk that the people who write and publish the material that is published in that publication may take bribes for doing the articles they do?

MR. ENTIN: Objection to the question,

your Honor. I would like to approach the side bar.

THE COURT: What is the objection?

MR. ENTIN: The objection, your Honor, is No. 1, the specific question goes to this witness' interpretation of the good-faith disclaimer and this witness has not testified as to the truth or accuracy of the disclaimer, just the fact it was published.

Secondly, there is no showing on the record he can interpret it.

And thirdly, it is an improper question.

THE COURT: First of all it might be helpful that the jury know what this good faith disclaimer is.

Do you want to ask him to read it so we will know what this is all about?

MR. LOWE: Perhaps it would be easier since I have a loud voice, perhaps I will read it myself.

It is headed "Good Faith. Arnold Bernhardt Co., Inc., publisher of the Value Line Investment Survey and the Value Line OTC Special Situation Service serves also as the manager and investment advisor of three mutual funds and as personal consultant to individual investment counsel clients. Officers and directors, security analysts and other employees of Arnold Bernhardt & Co., Inc. and the company itself in certain affiliated companies under common ownership and control" -- and an indication those affiliated companies are thereafter referred to as the affiliate companies -- "may also invest from time to time for their own accounts in securities, ranked or reported on in the services.

"In order to minimize conflict of interest --"

MR. ENTIN: I object to the intonation of the reading, your Honor. He is reading this to the jury for information. I object to the intonation and move for an instruction.

THE COURT: Mr. Lowe, try to read it in a normal tone.

MR. LOWE: "Arnold Bernhardt & Co. imposes the following rules upon itself, its officers, directors, employees and affiliated companies.

"1. The purchase of a security by any of the above persons or entities is forbidden if the purchase would be made with the intention of selling on a price rise that may be caused by (1), recommendation in one of the services or (2), purchasing by one or more of the funds managed by the company, or (3), buying by individual investment counsel clients.

"2. Information as to (1), what the services will recommend, what the fund will buy, and (3), what will be given to individual clients is to be held in strictest secrecy and made only known to those who need to know.

"3. If any person subject to these rules finds that one of the services has especially recommended a particular security for purchase as a special situation, and that person happened to own the security at the time of recommendation, he is prohibited from selling that security for a period of five months after the time of recommendation, if it is a security traded over-the-counter or for three months after the time of recommendation if it

is traded on the New York or American Stock Exchange, even though he may have had no knowledge that the security was about to be recommended.

"4. Every officer, director and employee must report every month to the legal department of the company every security transaction that has been made for his own account or for any account he advises or in which he has any other beneficial interest. The transactions are reviewed by the company's counsel and its security officer, and violations, if any, are reported to the president. Violations of the company's conflict rules may cost the officer or employee not only his position, but his vested interest in the company's profit-sharing and retirement plan as well.

"5. Whenever a security in which an officer or director of this company or the company itself or any of the affiliated companies, directly or indirectly owns an interest with a cost of more than $5000 is especially recommended in either of the services, a legend at the bottom of the page calls the reader's attention to that interest.

"6. As a further precaution, the name of the special situation which is recommended once every month in the Value Line Investment Survey and twice a month in

the Value Line OTC special situation service is sent by collect telegram to any subscriber who wishes to have it sold. The telegram is sent just before the text of the recommendation is sent to the printer. Although we deplore telegraphic advice for it is obviously superficial and 'tippy' this is the only method we have been able to devise to assure every subscriber wherever situated that he will know as soon as anyone else what the name of the special situation recommendation is to be if he wishes to be so informed.

"7. When recommendations to buy or sell are made for more than one client, publication or fund, care is taken that the recommendation will be fairly made available to all concerned. The pattern of execution is under the constant scrutiny of one of the company's security officers, one of whose specific duties is to guard against unfair discrimination intentional or unintentional, where executions are effected for two or more clients in the same security transactions are proportionately divided.

"These rules in essentially their present form have been in effect in the company for 35 years except the rule requiring monthly written reports which has been enforced since February 1, 1961, and which has been revised to comply fully with the new porting requirements of the

SEC.

"The complete set of the current conflict rules of this company, which in the SEC study is described as one of the strictest and most detailed of any they have seen will be sent to any subscriber on requeat."

THE COURT: What is the question?

THE WITNESS: Now that we know this disclaimer?

Q Is there anything in that statement which I just read that tells the public. the readers of that publication, that they must be on their guard or that they must not rely on the fact that the people who write and publish the articles in that publication, are independent and objective, and that the public runs the risk that they may have been bribed?

MR. ENTIN: Objection, your Honor. It calls for an interpretation of this article, outside the scope of direct. The jury can determine what it says. It is a question of fact for the jury, not a conclusion of the comptroller of the company.

THE COURT: This witness was called by you to tell us if the company has such policies.

MR. ENTIN: Only to identify the policy, your Honor. The policy speaks for itself. I didn't get into any interpretation on direct.

THE COURT: Overruled.

Q Do you have the question, Mr.Crooker?

A As I understand it,you are asking me to tell you if I think in here there is information given to the public which says that there may be some employee who is taking a bribe?

Q That as far as the publication is concerned that is the public's risk. Is there anything there that alerts the public that they are to be alert to the risk that Arnold BErnhardt & Co. does not hold itself out as independent and objective and that their employees may be bribed?

MR. ENTIN: Objection, your Honor, as to the form of the question.

THE COURT: Overruled.

A Well, in this particular good faith statement, my own personal interpretation is --

MR. ENTIN: Objection what his personal interpretation would be. I believe he is being asked what the corporate --

THE COURT: He is an officer of the corporation. What is your title?

THE WITNESS: Comptroller.

THE COURT: How long have you been there?

THE WITNESS: Since October 1969.

THE COURT: Are you bound by that statement?

THE WITNESS: Yes, sir.

THE COURT: Tell us what it says.

THE WITNESS: I don't believe there is anything in the statement which says to the public that it is possible that some employee might be taking a bribe.

Q How does Arnold Bernhardt & Co. hold itself and its publication out to the public?

MR. ENTIN: Outside the scope of direct, your Honor.

MR. LOWE: That is why I didn't ask a leading question, your Honor.

THE COURT: Let me hear the question, Mr. Reporter.

(Question read.)

THE COURT: YOu don't understand the question?

Q How do they represent themselves to the public?

THE COURT: By this statement?

MR. LOWE: Not necessarily, your Honor. In general.

MR. ENTIN: Outside the scope of direct, your Honor.

THE COURT: I don't quite understand the question.

Are you asking him to tell us what the purpose of the publication is, when you say how does it hold itself out?

MR. LOWE: The purpose, your Honor. What I am asking is, what does Arnold Bernhardt and Value Line represent itself to the public to be.

THE COURT: All right. I understand it now.

MR. ENTIN: Objection, your Honor. Outside the scope.

THE COURT: Overruled.

A Arnold Bernhardt & Co. represents itself to the public as a reliable, reputable investment advisory publisher, and a manager of investment companies and individual investment accounts. Just what it says here.

Q With regard to its publishing activities, Mr. Crooker, does it represent to the public that the recommendations and opinions expressed in the publication are objective, independent and unbiased?

A It represents to the public that its recommendations are based on certain facts. We have a ranking system which we use, and every recommendation is supported by references to this information.

Q Does the Value Line publication hold itself out to the public as containing in it paid for advertising for

any security?

MR. ENTIN: Objection, your Honor, to the form of the question and again outside the scope of direct.

THE COURT: Overruled.

A Absolutely.

Q Doesn't it represent quite the contrary to the public? In other words, the exact opposite of paid for advertising, is that not right?

A What is the opposite?

Q Independent, objective evaluation.

A Yes, that is what it represents.

Q So that, Mr.Crooker, when one of your editors and writers accepts a $15,000 bribe to recommend a stock called Power Conversion, Inc., your readers and subscribers are defrauded, aren't they?

MR. ENTIN: Objection. It calls for a legal conclusion, your Honor, and again outside the scope of direct.

THE COURT: Overruled.

A Well, I am not a lawyer. I don't know what you mean by defrauded. We do say in another portion of this publication that all of the factual information is obtained from sources believed to be reliable but is not guaranteed.

Q Do you understand what fraud means?

A Not in the legal sense,no.

MR.BERGER: VEry well. Then I will withdraw th question.

I have no further questions.

THE COURT: Anything further of this witness?

REDIRECT EXAMINATION

BY MR. ENTIN:

Q Mr.Crooker, under paragraph 5 of the Good Faith Disclaimer, whom does it say will disclose in the publicatio a beneficial interest or an interest in stock?

A Officers, directors of this company, or the company itself, any of the affiliated companies.

Q In September of 1972, was Eric Aiken an officer or director of Arnold Bernhardt & Co.?

A No, sir.

Q If Eric Aiken had reported a beneficial interest in the stock of Power Conversion to Arnold Bernhardt & Company's legal counsel, pursuant to paragraph 3 of this Good Faith Disclaimer, would it have been disclosed pursuant to paragraph 5?

A No, sir.

MR. ENTIN: Thank you. Nothing further.

RECROSS-EXAMINATION

BY MR. LOWE:

Q Mr. Crooker, if Mr. Aiken had disclosed to company counsel that he had gotten $15,000 in cash from men who were promoting that stock, Power Conversion, and that he had written that articlein return for that $15,000 in cash, what would have happened?

MR. ENTIN: Your Honor,I object. That certainly calls for conclusion beyond the scope --

MR. LOWE: The same conclusion Mr. Entin asked for as to what would happen if he had reported an interest in the stock, your Honor.

THE COURT: Overruled, Mr. Entin.

Read the question, Mr.Reporter.

(Question read.)

MR. ENTIN: Objection, your Honor. It assumes a fact not in evidence. There is no fact in evidence thatEric Aiken didn't disclose to company counsel, there is no fact in evidence that he didn't disclose to anyone.

THE COURT: Overruled.

A I think you have to understand, I am only one of several officers and something like this, if it had been disclosed, would of course have been a major company decision. However, I think I can safely say if it was

prior to the publication, the article would never have been printed. If it was after the publication, then I am sure the company would have printed in its publication that they had learned this, and warned whoever had previously read it that that condition did exist.

Is that what you are asking?

MR. LOWE: I have no further questions.

THE COURT: Anything further?

REDIRECT EXAMINATION

BY MR. ENTIN:

Q That is all speculation on your part, is it not, Mr. Crooker?

A That is speculation.

BY MR. LOWE:

Q Is it not in fact a rather informed opinion as towhat would happen, as opposed to speculation?

A It is informed in the sense that I have some idea of what the top management, what attitude the top management of the company might take.

Q What did the management of the company have to say when they found out about the facts of this case?

A I don't know that.

Q Have you read anything published by your company having to do with the facts of this case?

A No, sir.

Q Do you regularly receive publications by your company?

A Yes, sir.

Q Has your company taken a public position as to this case and the facts of this case?

A I am not aware of whether they have or not.

MR. LOWE: No further questions.

MR. ENTIN: The defense rests.

THE COURT: Thank you. You may step down.

At this time we will take a recess. The jury is excused.

(Jury leaves the courtroom.)

(Recess.)

End 2B

(In open court; jury absent.)

THE COURT: Is there anything else at this time?

MR. ENTIN: Has the Government rested, your Honor?

MR. LOWE: Yes, the Government rests.

MR. ENTIN: Yes, your Honor.

MR. BERGER: At this time your Honor the defendant Rodman moves for directed verdict of acquittal based upon the fact that the Government has failed as a matter of law to prove beyond a reasonable doubt the essential element of the crimes set forth in the indictment, Counts 1 through 12.

THE COURT: Do you want to elaborate on that?

MR. BERGER: Your Honor, Mr.Entin will elaborate on it and I will join in his motion, but specifically some of the areas are that the Government has failed to prove beyond a reasonable doubt that Mr. Rodman participated in the scheme or artifice to defraud. The Government has failed to prove beyond a reasonable doubt that Mr. Rodman participated in a gratuity to Mr. Aiken. The Government has failed to prove beyond a reasonable doubt that Mr. Rodman advised Mr. Aiken or advised Mr. Perlmutter not to disclose the gratuity.

The Government has failed to prove beyond a

reasonable doubt that Mr. Aiken was a publisher as contemplated by the statute.

The Government has failed to prove beyond a reasonable doubt that the gratuity, if paid, was paid by a dealer of Power Conversion stock.

The Government has failed to prove beyond a reasonable doubt that a gratuity if paid, was paid by a dealer in any stock.

The Government has failed to connect beyond a reasonable doubt Mr. Rodman to the scheme and artifice to defraud so that the hearsay testimony should be probative at all. That testimony has no probative value.

That is the basis of the motion, your Honor.

THE COURT: Does the Government care to reply with respect to the motion made at the end of the whole case by counsel for Rodman, for a directed verdict of acquittal?

MR. LOWE: Your Honor, the Government's position is that it has presented evidence from which a jury not only could, but should find the defendant Rodman guilty beyond a reasonable doubt of all of the charges in the indictment and if your Honor has any particular area you would like me to address myself to, I would be happy to do that.

THE COURT: As I understand Mr.Berger's motion,

one of his grounds is that the Government has failed to show that Mr. Rodman was a dealer as required by 77Q.

MR. LOWE: Your Honor, the Government contends by his occupation he was of necessity a dealer. He was a trader for a brokerage firm, he was a customer's man for a brokerage firm, a brokerage firm that was making a market in that particular stock in which the transactions were voluminous as the records of that firm show and the Government's evidence shows that 90 per cent of those transactions were conducted by Mr. Rodman directly.

The evidence is not only sufficient, but overwhelming to find that Mr. Rodman was a dealer, a dealer being a person who, as a professional business, buys and sells securities.

Mr. Rodman, by being a trader and registered representative for a broker-dealer is almost by definition a dealer in securities. That was his business during the entire time relevant in this particular case.

THE COURT: What about Mr.Berger's claim that there is no eviddnce from which the jury can find beyond a reasonable doubt that Mr. Rodman participated in the $15,000 bribe given to Mr. Aiken?

MR. LOWE: Your Honor, I would point to the testimony, among others of Mr. Robert Wymbs, as to the

conversation he testified overhearing in which the bribe of Mr. Aiken was discussed and among Mr. Rodman, Mr. Zammas and Miss Gennaro.

I would point to the testimony of Mr. Constantinou who testified Mr. Rodman told him in response to a question how do you get an article in Value Line, Mr. Rodman replied, "It costs."

I would point to the testimony of Irving Orenstein who testified that he was told not only that there would be an article but that the individual who was writing the article was going to get some options for the stock.

THE COURT: By Rodman?

MR. LOWE: It is not clear, your Honor, which one of them told him that particular statement since he testified he was unable to remember whether they were both present, at that time.

I would point to the testimony of Mr. Umbogy who testified Mr. Rodman told him among other things that Mr." ammas had just completed the arrangement for having the article published when the article was about to hit the street and on the attempt of the strength of that article, Umbogy got the shares.

The stock certificates were given to Mr. Aiken were in Mr. Rodman's name, bear his signature, and I

think from all of those facts the jury again, not only could but should find Mr. Rodman is guilty of those offenses.

THE COURT: What do you say, Mr. Berger, to the Government claiming that there is evidence from which the jury could find beyond a reasonable doubt that Mr. Rodman was a dealer within the contemplation of 77Q.

MR. BERGER: Your Honor, I believe that it is possible there is evidence that they could find Mr. Rodman was a dealer. I believe that the payment had to be made by a dealer and had to be made to a publisher. I believe the Government has failed to prove beyond a reasonable doubt that the payment was paid by Mr. Rodman or that it was made with the knowledge of Mr. Rodman.

With regard to the question of publisher, I do not believe that there has been any proof that the payment was made to a publisher. As a matter of fact, the indictment claims that the publisher was defrauded.

Mr. Aiken himself testified that the final word was that of Mr.Bernhardt. He may not always have exercised that authority, but he did have the authority as to the final word whether it was published or not.

Section 77QB was aimed at the publisher, the taking of a bribe by a publisher, not by an employee of a publisher who is not an officer or director of a publisher.

That section, 77QB does not apply to Mr. Aiken. Mr. Aiken was not a director, he was not an officer, not the publisher and he himself testified that he didn't have the final word.

In addition to that, there was no evidence whatsoever that anybody told Mr. Aiken not to disclose.

The Government didn't offer one iota of evidence on that. If Mr. Aiken didn't disclose, then that was his doing. He was never asked did Mr. Rodman tell you not to disclose this payment.

He was never asked did Mr. Tammas tell you not to disclose this payment.

If that type of evidence is to be implied, is to be inferred, you would be building inference upon inference

Now, the non-disclosure goes to the crux of this case and it was incumbent upon the Government to show that Mr. Aiken was told not to disclose.

The fact that there could be an inference from the payment in cash, it is not unusual to pay things in cash. Youp ay things in cash every day. There is no inference that any transaction is illegal because you paid in cash.

I think it would be an improper inference on the part of the jury to assume that a payment in cash is the

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same as saying do not disclose.

THE COURT: Just a moment. The first question to you was what do you say to the Government's claim that there is evidence in which the jury can find beyond a reasonable doubt that Mr. Rodman was a dealer, and then you pointed out that Mr. Aiken was not a publisher.

MR. BERGER: Your Honor, with regard to the question of dealer --

THE COURT: We have passed that. With respect to whether Mr. Aiken was a publisher, the statute does say that it shall be unlawful for any person to publish, give publicity, circulate notice and so forth, purporting to offer a security for sale, describe such security for consideration, receive directly or indirectly from an issuer, underwriter or dealer without fully disclosing the receipt for such consideration an amount.

Yousay the Government has failed to prove that Mr. Aiken was a publisher, is that it?

MR. BERGER: Fails to prove that he was a publisher, fails to prove that he circulated, and it fails to prove the allegations set forth in the indictment as to what Mr. Aiken was supposed to have done in regard to that statute.

Mr. Entin has cases on point --

THE COURT: Just a moment, Mr. Berger. The article was in fact published, was it not?

MR.BERGER: Yes, your Honor, and if the publisher had knowledge of the gratuity, then I would say it would be a violation of the statute. But, the Government has failed to prove that the publisher had knowledge of the gratuity, that the publisher failed to disclose the gratuity.

THE COURT: What do you say, Mr. Lowe?

MR. LOWE: Your Honor, I say to that, that Mr. Berger cannot read. The statute says that any person who publishes, circulates and in effect causes to be disseminated to the public anything like what was done in this case, commits a crime.

Mr. Berger's allegation or argument that it is limited to a publisher in the sense the Arnold Bernhardt had to know about it, is an exercise in intellectual dishonesty. It is not accurate, misreading --

MR. BERGER: Your Honor, I object to Mr. Lowe saying it is an exercise in dishonesty. It is not an exercise in dishonesty. I am just stating what is in the cases and what Judges have said. If they were dishonest in their opinions, your Honor is an exerciser in dishonesty.

MR. LOWE: I heard no statement by a Judge, your Honor.

MR. BERGER: Your Honor, I have said Mr. Entin will be bringing forth the cases.

THE COURT: Just a moment.

Mr. Aiken was charged in this indictment with having committed this crime, was he not, along with two defendants on trial.

MR. BERGER: Yes, your Honor.

THE COURT: As the Government points out, any person who causes an act to be done, which is done by himself, would violate a law of the United States Criminal Statute, is guilty as a principal, isn't that so?

MR. BERGER: If the principal is also indicted, your Honor. In other words, if it were not illegal for Aiken to take the bribe because he does not fall within the individuals in the statute, publisher, et cetera, if Mr. Aiken --

THE COURT: The aiding and abetting statute reads, does it not, that any person who causes another to do an act, done by himself, which violates the criminal statute of the United States, can be convicted as a principal. It doesn't say anything about the person who does the act having knowledge that the crime is being committed, does it?

MR. BERGER: Your Honor, I agree with that, excep

for one thing, that the indictment would have had to have named the publisher Bernhardt, because you have to cause Bernhardt to publish and it would be Bernhardt who would be the one not to disclose the gratuity.

That is my understanding of the law, your Honor, in good faith.

I believe that Bernhardt would have had to be a defendant similar to the case of United States vs. Amick, the Indiana case where the publisher was joined and there was aiding and abetting.

In this case the Government was not joined. The Government claims there was a fraud on the publisher.

THE COURT: The Government does cite and the indictment cites, Title 18, United States Section 2, Counts 1 through 6, cites the mail fraud statute and the aiding and abetting statute and the same with respect to 77QB. It cites that in Section 2.

MR. BERGER: Your Honor, I am limiting myself at this time to the Section 77QB violation.

THE COURT: I am pointing out the Government has cited in connection with that and those counts 7 through 12, the aiding and abetting statutes but the law in this Circuit is, even if they didn't cite Section 2, Section 2 is applicable.

Any situation where the facts show that one who causes something to be done, which is done by him, would be a violation of the laws of the United States and he is guilty as a principal.

In this case the jury could find beyond a reasonable doubt, couldn't it, that Mr. Aiken took a bribe and caused Value Line, published by the Bernhardt Company, to violate this statute, isn't that so?

MR. BERGER: Your Honor, I understand your reasoning, but I don't agree with it to the point that I believe that Bernhardt would have had to be a defendant in the case, that only Bernhardt could violate the statute and anything Bernhardt did without doing it wilfully, knowingly, intentionally, would not be a violation of the statute. Aiken may have acted wilfully, knowingly and intentionally, but he didn't cause Bernhardt to act wilfully, knowingly and intentionally to violate the statute.

The fact that the statute was violated by Aiken, does not mean that the publisher violated the statute.

What I am saying is, this statute is applicable to a publisher and the publisher should have been joined. If the publisher was joined as a defendant and if there was proof that the publisher went ahead and didn't disclose this bribe and if he didn't disclose this bribe wilfully, or

this payment or gratuity, wilfully and intentionally. But the only one wehave that acted wilfullly and intentionally was not Bernhardt. It was Aiken. Therefore, Bernhardt could not have acted wilfully and intentionally which are necessarily elements to be convicted under Section 77QB.

If Bernhardt is not convicted under that section, the aiding and abetting does not come into play because Aiken didn't cause Bernhardt to commit an act that could have convicted Bernhardt under Section 77QB.

That is my whole argument.

THE COURT: What do you say to the Government's claim that there is evidence in which the jury could find beyond a reasonable doubt that Mr. Rodman did participate in giving the $15,000 to Mr. Aiken.

He talked first about testimony of Mr. Wymbs, that he overheard conversations in the office of C.I. Oren between Rodman and Zammas and who is the woman?

MR. LOWE: The conversation at C.I. Oren were only Rodman andZammas. There were other conversations he testified overhearing at the apartment at 35th Street and Lexington Avenue. The woman was a Miss Darnice Gennaro, who was, I believe, identified by at least one witness as Mr. Rodman's girl friend.

MR. BERGER: Your Honor, as to Mr. Wymbs, I

never intended to spend too much time on Mr. Wymbs --

THE COURT: I amnot asking you about that. Your claim is, there is no evidence from which the jury can find beyond a reasonable doubt that your client participated in giving a $15,000 bribe to Mr. Aiken. Let's talk about whether there is any such evidence.

The Government has pointed to certain evidence. The testimony of Wymbs that he overheard your client talking about such a bribe and that he saw an envelope produced with some money in it, which he understood from the conversation and the context was money to be paid to somebody for that article.

Then there was the testimony of Mr. Irving Orenstein who was the owner, apparently of C.I. Oren. He was told by Rodman andZammas or one or the other, the article would be published.

Then there was testimony of Periclese Constantinou that he visited Rodman in the summer of '72, in a restaurant, when they discussed Fantastic Fudge, and he wanted Rodman's help with respect to that, andRodman said he had gotten Power Conversion written about, and that it cost him to do so and he couldn't do the same with Fantastic Fudge.

What about that?

MR. BERGER: I will address myself first to Mr. Wymbs.

Mr. Wymbs' testimony was totally incredible. He is not entitled to any evidentiary probative evidence.

THE COURT: That is for the jury to determine whether he is credible or not. So what we have to talk about is whether there is any evidence, and then it is up to the jury to believe that or not.

We have to let the jury decide.

MR. BERGER: Your Honor, I am saying beyond a reasonable doubt, relying upon Mr. Wymbs, no jury will bring in a verdict of guilty against Mr. Rodman because he is not believable beyond a reasonable doubt under any circumstances,under any stretch of the imagination.

There was conflict between his testimony and the testimony of Aiken, and the testimony of Perlmutter, absolutely a fabricated story. I don't wish to go into my closing argument, your Honor, but he is not entitled to any credibility.

THE COURT: What did Perlmutter say about your client?

MR. BERGER: He never discussed it with my client, he said. Aiken said he never discussed it with my client.

THE COURT: What about Periclese Constantinou's testimony?

MR. BERGER: May I address myself to Mr. Orenstein first, your Honor?

THE COURT: Yes.

MR. BERGER: Mr. Orenstein testified that somebody told him. It could have been Rodman, it could have been Zammas, but he didn't know who told him. That was his testimony. He didn't know. Now, if Mr. Orenstein didn't know who told him, the jury certainly can't infer from his testimony that it knew who told him. His testimony, we made a motion it should be stricken as to both Mr. Zammas and Mr. Rodman because of the fact he was unable to specify who told him. I renew that motion at this time.

He was absolutely unsure.

THE COURT: That is denied.

What about the testimony of Pericles Constantinou?

MR. BERGER: He was an admitted perjurer. He admitted that he perjured himself and one of his prime concerns was to stay out of prison. He conflicted with the testimony of Mr. Aiken. He conflicted with the testimony of Mr. Rodman -- I am sorry, testimony of Mr. Perlmutter. He stated that this conversation took place some time in July, some three months prior to the time that this meeting or alleged meeting with Mr. Perlmutter and Mr. Aiken in

the middle of September ever took place. He stated that he assumed that Rodman paid for the article. He said Rodman didn't tell him that he paid for the article.

THE COURT: What about the testimony of Alan Umbogy. He testified that Rodman asked him to consider purchasing shares of Power Conversion because an article was coming out in Value Line in about a week, isn't that so?

MR. BERGER: No,your Honor, that was not his testimony. His testimony was he received a call from Mr. Rodman on or about the 26th of September, that he met with Mr.Rodman on or about the 27th of September; that Mr. Rodman told him at that time that an article would be coming out.

He didn't tell him that the article was paid for, he didn't tell him that any gratuity was paid for the article and he didn't tell him he arranged for the article and, as a matter of fact, the article according to the testimony of Mr. Aiken had already been mailed, was already in the hands of the subscribers at the time that Mr. Rodman had this alleged conversation with Mr. Umbogy, and again, Mr.Umbogy is under investigation and --

THE COURT: He is the one who testified that your client gave him a copy of the article.

MR. BERGER: That's right, your Honor, gave him a copy of the article, photostatic copy on the 27th of September.

MR. LOWE: Your Honor, I am tired of the misrepresentations of the record. Mr. Umbogy got trapped into agreeing with Mr.Berger's cross-examination that it was the 27th. ON his cross-examination by Mr. Entin he made it very clear that the 27th had no magic for him, as a matter of fact, he testified that he associated the date of the article and the date of the meeting which means it must have been the 29th, and I think Mr.Berger is misrepresenting the state of this record.

THE COURT: It is for the jury to determine whether he recollected precisely the date.

MR. BERGER: Your Honor, I am sorry Mr. Lowe feels I am misrepresenting again.

THE COURT: Mr.Berger, in any event, let's go over the testimony briefly,for the record, because you are making a motion to dismiss or motion,r ather, for a judgment of acquittal on the ground the Government has failed to produce any evidence in which the jury can find beyond a reasonable doubt that your client is guilty.

As I indicated, there is testimony of Pericles Constantinou who testified he met Rodman in the

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summer of '72 at a New York restaurant to discuss Fantastic Fudge.

He testified, in effect, that Rodman told him that the Power Conversion article was pending and that it cost him, Rodman.

Then there is the testimony of Wymbs that he first met Rodman at C.I. Oren, Zammas introduced him to Rodman, he had 15 to 20 conversations as to Power Conversion, and he asked him on the telephone when the article would be finished.

End 2A

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Wymbs testified Rodman produced an envelope with $5000 in it and said it was for the Power Conversion article.

Then there was the testimony of Irving Orenstein that he employed Rodman at C. I. Oren and he was so employed in '72. He, Orenstein, testified that he was told about the article that would appear in Value Line. He couldn't remember whether it was told to him by Zammas or Rodman, but he believed it was by one or the other or both.

Then there was testimony by Alan Umbogy that Rodman asked him to consider purchasing shares of Power Conversion because the article was coming out in about a week. Umbogy also testified that Rodman wanted the Power Conversion stock to get moving before the article came out and that Rodman told him Zammas had just finished arranging for publication of the article.

Rodman also gave Umbogy a copy of the article the day it came out.

With respect to all that, therefore, the court's ruling is that there is evidence, if believed by the jury, from which the jury can find that the defendant Rodman is guilty as charged beyond a reasonable doubt.

The court also finds there is evidence from

which the jury can find that the defendant Rodman was a dealer and that he participated in the payment of this bribe to Aiken and that Aiken, of course, caused the article to be published without disclosing that he had accepted a bribe.

So the motion madeby the defendant Rodman at the end of the government's case and at the end of the whole case for a judgment of acquittal is denied.

Now, Mr. --

MR. BERGER: Your Honor --

THE COURT: You can't be heard further.

MR. BERGER: Not to the motion, your Honor; just to the record on one point which I deem very important. We have our transcripts with us.

Your Honor stated that Mr. Orenstein said that either Zammas or Rodman or both told him.

THE COURT: That's for the jury to decide what Mr. Orenstein's testimony was precisely, but that's my recollection of the testimony.

The jury is going to be instructed. Let's not waste time with what I have ruled.

Mr. Entin.

MR. ENTIN: Your Honor, with the indulgence of the court, Mr. Kimler will argue the motion for

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directed verdict.

THE COURT: All right.

MR. KIMLER: Your Honor, defendant Zammas joins the motion made by Mr. Berger and I move for judgment of acquittalthat as a matter of law there is insufficient evidence for this case made to the jury and accordingly the court must dismiss the case. I will address myself to counts 7 to 12 first.

Interestingly enough, your Honor, the indictment itself, which was filed before this court, charged that William Eric Aiken, Rodman and Zammas unlawfully, knowingly, et cetera, by the use of the man, circulated an article in the issue of Value Line describing Power Conversion without disclosing in any way a $15,000 bribe paid as consideration to defendant Aiken by the defendants Zammas and Rodman, who were dealers in stock of Power Conversion.

The statute, which is what we have to look at, makes the type of payment we are talking about perfectly legal. The statute says that if disclosure is made in the article and the amount of the payment is disclosed ind the article, then the payment itself is legal. That's what 77(q)(b). says. It is clear from the statute.

We are not going to deny payment was made and I will even concede Mr. Zammas may have been a dealer, for purposes of the argument. But in order to convict in 77(q)(b) the government has to prove, among other things, two essential elements. The first is a gratuity was paid by the defendants with the intent that said gratuity and the amount thereof not be disclosed. That's the requirement of 77(q)(b).

The government, in its response to the bill of particulars filed in this case, had the following to say. Paragraph 1:

"In or about the week ending September 15, 1972, the defendant Zammas met with Aiken at a restaurant where an agreement to write and publish the subject article in return for undisclosed compensation was made."

That's what the government said in the bill of particulars. In a memo submitted to this court about a week and a half ago the government said -- memorandum of law in support of the admission -- the government says they will prove the following:

"The government's proof will demonstrate that Perlmutter was used by the defendant Zammas to approach Eric Aiken and arrange the deal for Aiken to publish an article about Power Conversion without

disclosing defendants had paid him a $15,000 bribe."

Both the testimony of Stanley Perlmutter and the testimony of Eric Aiken failed to establish any proof on this particular point.

THE COURT: Failed to establish what point?

MR. KIMLER: That either defendant Zammas or Rodman ever asked them not to disclose any compensation. Never a word of evidence in this record that the defendants asked him not to disclose.

THE COURT: What you are saying is that the government has not produced any direct evidence that either Zammas or Rodman said to Aiken, "Please do not disclose."

Is that your claim?

MR. KIMLER: That's correct.

THE COURT: The government has put in evidence. The question then is whether the government has put in evidence from which the jury could find beyond a reasonable doubt that this was the intention of all involved, isn't it? That is, whether there is circumstantial evidence from which the jury could find that that was the understanding, undisclosed understanding of all the participants.

MR. KIMLER: I agree and the test for circumstantial evidence is every reasonable hypothesis of innocence. The government offers two things: a cash payment.

They say $15,000 in cash was paid. That wasn't, if your Honor please, the only payment. There were stocks and stock options offered. In addition, a cash payment does not exclude every reasonable hypothesis of innocence.

THE COURT: The Second Circuit has ruled out your statement of law. That is, that the government must put in evidence which excludes every hypothesis of innocence, or whatever that formulation is. That is expressly ruled out by United States v. Taylor. Let's not into that kind of language.

There is evidence, is there not, that this payment of $14,000, at least, was made in the men's room of a restaurant, The Ground Floor? Isn't that the testimony of Aiken and Aiken's wife and Mr. Zammas' girlfriend? Didn't they testify that they all met in a restaurant?

MR. KIMLER: That's correct, they met in a restaurant.

THE COURT: Didn't Aiken testify that they

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went in the men's room and that's where Mr. Zammas gave him this $14,000?

MR. KIMLER: That was Mr. Aiken's testimony.

THE COURT: If the jury believes that, can't they infer from that, the payment having been made in the men's room in the restaurant, that it was the intention or tacit understanding between the parties that that payment not be disclosed?

MR. KIMLER: I don't nelieve you can infer that material element of this crime from those facts. There are other reasonable inferences.

THE COURT: Payment was made in cash. That's some evidence from which the jury can find that the parties understood that it was not to be disclosed, the sum of money of that magnitude being paid in cash would lead the jury to infer the parties would not intend the people to know what that payment was for.

MR. KIMLER: I believe the record reflects Mr. Aiken asks for cash.

THE COURT: That makes the point even better.

MR. KIMLER: Not really, if your Honor considers Mr. Aiken's testimony where he said he didn't trust Mr. Zammas from prior business dealings. If

he didn't trust him he would have wanted cash payment, if he didn't trust him.

I would also submit, your Honor, cash is legal payment.

Also, there was nothing sinister or secret about the whole transaction. If you believe the government's testimony and their evidence, the fact that the article is coming out was apparently discussed openly by the defendants. They didn't try and make a secret of it, if it was a secret.

THE COURT: Did they discuss openly payment to Mr. Aiken?

MR. KIMLER: They did not, but --

THE COURT: That's what we are concerned with, isn't it? Not whether an article is being published but whether there is an illegal payment for the article, undisclosed payment. That wasn't discussed publicly.

MR. KIMLER: That was not discussed publicly and the defendants, your Honor, never had a chance to see that article prior to publication.

Mr. Aiken's testimony was he took $1000 and said he was going to look into the stock, and the next anybody heard was, I believe, on the night of the 28th

they got a phone call at 11:30 saying it has already been published.

They defendants never had a chance to review the article, they had no idea -- the proof doesn't show they had any idea whether disclosure was made or not. Keeping in mind the payment itself is legal, it is only the failure to disclose which becomes illegal. There is no evidence on this particular point.

THE COURT: Mr. Aiken also testified that he had some arrangement with Mr. Zammas and Mr. Rodman with respect to how he was to be paid if the stock went up. Do you recall that?

MR. KIMLER: I recall that.

THE COURT: And it is your suggestion that that is not evidence from which the jury could find beyond a reasonable doubt that the payment was not to be disclosed?

MR. KIMLER: That's correct, your Honor. There were stock options, nobody disputes that fact, but we get back again to whether these were disclosed. and there is nothing to show from Perlmutter or from Aiken that the defendants intended there be no disclosure, nothing. Neither witness testified to it. The government, in its bill of particulars, said they would

establish that and in the memorandum last week they said Stanley Perlmutter would testify to it. He didn't. Aiken didn't. Nobody did. There is just absolutely not one word in this record from anybody of the witnesses that said that these defendants intended it, they discussed it.

All the government proved was a payment was made and I submit a payment is legal if it is disclosed. It was Aiken, at best, who failed to disclose. You can't show that the defendants aided or abetted or procured because they just didn't have that opportunity. You must show an affirmative fact done before the fact to induce, procure or cause nondisclosure, an affirmative act done before the writing of the article. There is no such affirmative fact in this record and no witness has testified to such an affirmative fact.

The government has absolutely failed to prove beyond a reasonable doubt, and failed to put in any evidence that could go to the jury on that particular question.

The government didn't prove its indictment and bill of particulars and I submit any violation of 77(q)(b) was not proved by the testimony this jury has heard to date.

There are inferences that can go either way, and they are equally reasonable, and according to the government's own witnesses, why a cash payment was made.

As to the other charge, that is, addressing further to 77(q)(b), the government never proved Mr. Aiken published the article.

Perlmutter's proof, if you recall his testimony, he said Aiken did not have the final say as to what was published. Aiken himself testified that he did not have the final say.

THE COURT: The issue is whether, as I said to Mr. Berger, Aiken caused the article to be published without disclosing that a bribe had been accepted in connection with the writing of the article. That's the issue, whether he caused it. It is conceded he was not the owner and publisher. The government doesn't claim he was the publisher of the magazine or the owner of it. He was an employee who wrote articles which the publisher knew it would publish so the issue is whether Mr. Aiken caused the publisher to do something which was in violation of the laws of the United States.

MR. KIMLER: First, your Honor, the statute

doesn't mention "cause to be published."

THE COURT: Title 18, United States Code, Section 2, does.

MR. KIMLER: Again we are getting back to the question whether they showed that they did an act before the article was written, and in response to that your Honor asks a question concerning this publication. We admit that possibly Eric Aiken violated this statute but we come back to the same issue: did the government prove that Tom Zammas and/or William Rodman aided, abetted or procured Eric Aiken in violating that statute. They failed to prove that through their own witnesses.

No witness -- and I have read that transcript all night last night -- no witness testified that either defendant said don't disclose.

THE COURT: We have been over that. Let's go to another point.

Did you have another point?

MR. KIMLER: As to counts 1 through 6, which I believe are mail fraud, I address myself to those briefly.

First I submit, your Honor, if counts 7 through 12 fail, 1 through 6 must fail. There can't be a

mail fraud since the statute makes the payment legal. The statute discusses the mail and mailing of such a type of article. Clearly, Congress has preempted the field in this particular regard. A mailing of this type of article is legal if the payment is made and the amount of the payment is disclosed. Accordingly, there can't be a mail fraud.

The essence of mail fraud is first there is a scheme or artifice to defraud and the government alleged Bernhardt was defrauded and the readers and subscribers were. The government did not have a witness from Arnold Bernhardt & Company that they weren't told that. Eric Aiken didn't testify to that. The government called them as their witness and they could have asked them the question: "If a payment had been made, did you disclose it?" and they didn't ask it. The record is silent.

THE COURT: The question is whether the article disclosed it.

MR. KIMLER: That's correct. That is absolutely correct. But as to the mail fraud, we are going into counts 1 through 7. They say Arnold Bernhardt & Company weren't told, they were defrauded. There is no evidence to prove that particular point.

As to the second point, public right to rely, I point out 77(q)(b) preempts this. It discusses what a violation is, and I further point out the public policy of Arnold Bernhardt & Company, which is now in evidence, which is part of Value Line, clearly tells the public they have no right to rely on anything but an interest of a director or officer of the company. Any other type of interest, beneficial interest, would not have been reported. It would have been discussed at best in the internal workings of Value Line.

Incidentally, the rules were approved by the SEC, according to the publication. They were scrutinized by the SEC and apptoved by the SEC. That's in the disclaimer, the good-faith policy.

There is no proof that Aiken didn't disclose to the appropriate authorities. The government hasn't brought anybody to testify to that, and this can't be inferred.

We submit to the court as to all counts a directed verdict of acquittal must be granted. There is no evidence upon which this case can be sent to the jury.

THE COURT: Do you have anything further?

MR. KIMLER: Nothing further, your Honor.

THE COURT: Would the government care to reply?

MR. LOWE: Your Honor, I would point out, as your Honor has pointed out, as to the question of nondisclosure, it is patently obvious that these defendants did not intend that Mr. Aiken put a banner headline on this article saying this article has been purchased for $15,000 by the promoters of this stock. It would have been useless to them had it been disclosed, as I think anyone can properly find.

In addition, as your Honor pointed out, the circumstances under which the money was paid are much better evidence of the intent of the defendants involved than anything they may have said.

I think also it is quite clear that from the fact that Mr. Zammas and Mr. Rodman sat with Mr. Umbogy and told him about the article, asked him to take action based on the article without telling him they had paid to have that article written, it is a clear indication that they intended there be no such disclosure.

To have the disclosure would defeat the very purpose for which they wanted the article, namely, to help promote the stock, disclosure that it took

$15,000 in cash to get that man, Mr. Aiken, to write the article would have made the article worthless for that purpose. Therefore, it is clear that they never intended that it be disclosed and that no direct proof of intent is ever required in any criminal case and that the circumstantial evidence admits of no other reasonable interpretation.

The other point made by Mr. Zammas' attorney, if I understood it, seems to be that because Congress has seen fit to make it a crime not to disclose the payment, that Congress has thereby made the payment legal.

First of all, I would like to point out to your Honor -- and this really goes to the question of disclosure I think as well -- that it is a violation of the penal law of the State of New York to pay money to Mr. Aiken under the circumstances under which it was paid. It is a violation of the commercial bribery statute of the State of New York which makes it a crime to pay money to an employee to affect the actions in his employment.

This would ordinarily apply to such people as purchasing agents and some of the grain inspectors at the docks, but it applies equally to Mr. Aiken, I

think, in this case. So it is not appropriate to argue that the payment of money to Mr. Aiken in this case was legal.

It is clear, I think, that the payment of money to Mr. Aiken was not a violation of federal law. However, it iwas not legal.

MR. KIMLER: Your Honor, I would object here. It was legal within the federal statutes and we are here in the federal court.

THE COURT: As the government points out, it is incorrect to say to the jury something is legal which is made illegal by the state law. even though not made illegal by the federal statute.

MR. LOWE: At this point, your Honor, I don't have anything further to say, unless your Honor has a question you would like to address myself to.

THE COURT: With respect to the defendant Zammas and his motion for a judgment of acquittal, at the end of the government's case and now made at the end of the whole case, that motion is denied for the following reason:

There is evidence from which the jury could find beyond a reasonable doubt, if the jury believes the

testimony of the various witnesses, that Zammas is guilty as charged in counts 1 through 7 and 7 through 12.

First, there is the testimony of Aiken, a co-defendant, that Zammas gave him a thousand dollars and 900 shares of Power Conversion in an apartment on 35th Street and Lexington Avenue. Then there is the testimony of Aiken that Zammas gave him $14,000 in the men's room at The Ground Floor Restaurant the night before the article was published. Aiken then gave Zammas six advance copies of the article, according to Aiken's testimony.

The government has introduced into evidence, in corroboration of Aiken's testimony, Aiken's deposit slip for $9500, Aiken's check for $3500 paid to Perlmutter. The government has also introduced Aiken's checkbook and his monthly statement.

Then the testimony of Aiken was corroborated by the testimony of Perlmutter and by Susan Aiken and by Miss Palumbo, who testified yesterday.

There is also evidence from which the jury can find that the defendant Zammas was a dealer within the meaning of Section 77(q)(b), and there is evidence from which the jury could find it was the intent of the

the defendant Zammas, as well as the defendant Rodman, as I indicated earlier, that the payment to Aiken not be disclosed.

Yesterday I think I mentioned to you, in connection with motions made by the defendants then, that the court had found that there was independent evidence, quite aside from any hearsay statement, from which the jury can find, if it believes the testimony beyond a reasonable doubt, that the defendants were a part of a plan and scheme as charged in the mail fraud counts, and were involved in a common scheme and plan with respect to counts 7 through 12. And the evidence which I have just gone over in connection with these motions includes evidence quite aside from any hearsay statement of acts done and things said by the defendant Zammas and defendant Aiken from which the jury can find that they were members of the common scheme and plan.

What we will do is to go over the requests of charge, and at 2 o'clock this afternoon, after lunch, we will commence with the closing statements to the jury, and the defendant Rodman will go first and then the defendant Zammas and then the government, and then the court will charge the jury tomorrow morning.

What I plan to do is take a 10-minute recess and then tell you which of the requests to charge I have accepted and which I have rejected, so in making the closing arguments to the jury we will have that in mind.

MR. ENTIN: Your Honor, I would have a request that I do not think the government would have any specific objection to.

I would prefer to be able to prepare my closing on the basis of the information as to your Honor's charge, and I would ask if the court would allow us to begin summation to the jury tomorrow if we are in fact going to carry over to tomorrow vis-a-vis the charges anyway. We can get it in tomorrow and it wouldn't cost the court any additional time.

THE COURT: Well, it's 12:20 now. It hasn't been a very long trial. How many days have we been on trial.

MR. ENTIN: That's the reason I request it. We have been on trial nearly seven days. It has been a lengthy and complicated case. I feel the interest of justice would be very well served by giving all counsel additional time to prepare competent and proper closing argument.

THE COURT: When did we begin this trial?

MR.ENTIN: Tuesday morning, last week, your Honor.

MR. LOWE: That is correct, your Honor.

MR. ENTIN: We picked the jury Monday afternoon.

THE COURT: We recessed at 2 o'clock on Friday, so that was about three and a half days, and we are on trial yesterday, Monday, which is four and a half days, and the trial ended at 11:10 or so this morning, didn't it.

MR. ENTIN: I believe it was close to 11:30, your Honor.

THE COURT: Not quite five days.

I think what we will do, we will start the closing arguments this afternoon. I will recess now for about 10 minutes to go over these requests of charge.

MR. BERGER: May it please the court, if we are to start the closing arguments this afternoon, I would like to know that closing arguments will be completed this afternoon.

THE COURT: I think we may be able to do that. I am going to tell you now that I will allow

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each defendant an hour and the government will have an hour and a half, so we should be able to get it all in in this afternoon.

(Recess.)

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(Jury absent.)

THE COURT: Gentlemen, at this time I will tell you which of the Government's requests and which of the defendants' requests the Court accepts, which it rejects.

The following requests of the Government are accepted:

1, 2, 3, 4, 5, 6, 7, 8, 9, 10. 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 24A, 25. 26. 27. 28. 29, 30, 31 --

MR. LOWE: 31 is withdrawn, your Honor, since neither defendant took the stand.

THE COUURT: Yes, I am sorry, I did have that marked "rejected."

31 is rejected, and 32 --

MR. LOWE: Your Honor, that request is withdrawn.

THE COURT: Yes.

Do we have a problem now for the witnesses?

MR. LOWE: I would assume your Honor could not fairly give the charge until closing arguments. It is apparent from the testimony that people who were present according to the testimony were not called by the Government or the defense. If the defense makes any point out of it, the Goverrment then requests this charge. We

can't make that determination until --

THE COURT: Do you plan to make a point on that?

MR. BERGER: Yes, your Honor.

THE COURT: All right, 33 is accepted. 34 is accepted, 35 and 36.

With respect to the defendants' the following are accepted. 1, 2, 3, 4, 5, 6, 7, 8, 9 is rejected, 10 is accepted, 11 is accepted, 12, 13, 14, 15, 16 rejected, 17 accepted, 18 accepted, 19, 20, 21, 22 and 23 all accepted, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38.

With respect to 39, I don't think we have the problem with the witness Robert Wymbs and his attorney-client privilege. I think we worked that out, isn't that so?

MR. ENTIN: Your Honor, he did invoke the Fifth Amendment and attorney privilege, prior to the Court appointing an attorney to represent him.

THE COURT: I was addressing myself to attorney-client privilege only. There was one witness that did and then we had a side bar conference and it was worked out in such a way that I actually didn't invoke the privilege.

MR. LOWE: I believe that is correct, your Honor. In addition I would like to point out something. It is my understanding of the law that the invocation of the Fifth Amendment by anyone is meaningless as an evidentiary point.

It is not an admission of potential guilt or anything else. No inferences should be drawn by the jury from the invocation by anyone of the Fifth Amendment privilege.

I believe that that is entirely consistent with the theory of the Supreme Court's decisions in that area which indicate that drawing an inference from the invocation of the Fifth Amendment privilege places a price on the exercise of that privilege and thereby diminishes the value of the privilege.

THE COURT: Yes, there was some indication here that defendants were of that belief, that invoking the Fifth Amendment admits guilt, which of course it not true.

What I was trying to get clear is whether we did have a witness who invoked the Fifth Amendment privilege here. My recollection is it was not in fact done because we worked out at the side bar some resolution which avoided that problem altogether. Does that accord with your recollection, Mr. Lowe?

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MR. LOWE: It accords with my recollection. I believe Mr. Wymbs initially indicated a desire to invoke it, and after some discussion he answered the question that he was asked.

THE COURT: 39 is rejected then. I don't think we had that problem and the Fifth Amendment proposition stated by the government is correct.

Going on to 40, it is rejected.

41, accepted.

42, accepted. Judging the evidence is not clear to me here, so 42 is accepted, except for the last paragraph.

Did you want to say something, Mr. Berger?

MR. BERGER: Yes, your Honor, with regard to pleading the Fifth Amendment, I believe I know the cases Mr. Lowe is referring to. Those cases all hold that there shall be no inference to the defendant if one of the witnesses invokes the Fifth Amendment. Those cases do not hold that there should be no inference to the witness if that witness invokes the Fifth Amendment.

I have checked the law and I have read the cases and I have the cases. They all state there shall be no adverse inference to the defendant. If Mr. Lowe can show me a case where there shall be

no inference to the witness, perhaps I would change my mind.

THE COURT: A witness who invokes the Fifth Amendment?

MR. BERGER: I am allowed to remark that he invoked the Fifth Amendment, that he was not candid, but I can't say that he has admitted a crime.

But certainly the invocation of the Fifth Amendment is one of -- it is part of his demeanor. I am allowed to go ahead and refer to that, as long as I do not go ahead and state that he has admitted that he has been convicted of a crime and is guilty of a crime.

THE COURT: Bring in the case after lunch.

MR. LOWE: Your Honor, I don't argue Mr. Berger is not entitled to argue to the jury in his summation that the invocation of the Fifth Amendment, as part of the witness' demeanor and overall candor, should be considered by them. I maintain he is not entitled to a charge on the law that indicates that the invocation of the Fifth Amendment necessarily affects the credibility of the witness. He may argue the factual matter.

THE COURT: We have gone over that. I

have rejected 39 and I forgot to mention I accept r3.

MR. BERGER: I'm confused at this point, your Honor. May it please the court --

THE COURT: Yes?

MR. BERGER: -- I don't think I have done more in my requested instruction than Mr. Lowe just said I had a right to do.

THE COURT: First of all --

MR. BERGER: I'm trying to find which instruction it is.

THE COURT: 39.

MR. BERGER: I didn't intend to do any more. Yes, your Honor.

"The fact that a witness refuses to answer a question based upon one of the foregoing privileges may be considered by the jury in determining the credibility of the witness and" -- it is part of his demeanor, your Honor. That's what Mr. Lowe is saying.

THE COURT: That's not in your request of charge.

MR. BERGER: The last paragraph, your Honor, No. 39.

THE COURT: I see.

But the second statement would be amended

that the court ruled the witnesses Perlmutter and Wymbs refused certain questions asked of them by defense counsel if they believed that their answer to a particular question might tend to incriminate them. It is my recollection we didn't have the problem as to Wymbs and his attorney privilege.

MR. ENTIN: Your Honor, for the purposes of the record, I strenuously object to any one of the proposed defendant's charges not given.

THE COURT: I didn't hear that.

MR. ENTIN: We specifically object to any of the suggested charges that we have proposed which the court has indicated it will not give.

THE COURT: All right.

MR. ENTIN: As to the government charges, we object to each and every government charge in those areas in which they differ from the defense charges.

THE COURT: They hardly differ.

MR. ENTIN: In particularly, your Honor, request No. 19, which is elements of touting violation. We specifically and strenuously object to the area that there has been no disclosure of the payment, promise or amount of the consideration.

THE COURT: All right.

MR. ENTIN: We also specifically and strenuously object to government charge No. 24, non-disclosure.

THE COURT: Mr. Entin, now is not the time to object to the charge. You will have a chance after I charge the jury to put on the record your exceptions. I told you I am going to charge that. Then when I get through charging, you will be called to the bench and you can put on the record your exception to the charge.

MR. ENTIN: Thank you, your Honor.

THE COURT: I think we have a new rule, gentlemen, which I overlooked regarding closing argumnt, which I believe went into effect July lst.

MR. LOWE: Your Honor is correct in tht regard.

THE COURT: We have a new rule in this district which provides for the government to go first, for the defendants to answer, and then the government can have a rebuttal.

We will start now at 2:15. The government will open for an hour, then the defendants will rebut, and the government will have an opportunity to make a final rebuttal. That's the procedure under

the new rule.

Is that right?

MR. LOWE: Yes, your Honor, that is the new rule, unless the defendants wish to proceed in a different fashion. The government has no desire to do one thing or the other.

THE COURT: Do the defendants have any desire to do anything different?

MR. ENTIN: No, your Honor.

MR. BERGER: No, your Honor.

THE COURT: We will recess until 2:15.

MR. LOWE: Your Honor, one point. In light of the fact that we are applying the new rule, the government would prefer to have 45 minutes in its initial go-around and saving more time for rebuttal since the government believes that in this case the rebuttals will be much more important than the initial opening.

THE COURT: We will split it that way then.

MR. ENTIN: I would like to go on record, however, your Honor, at this point, and make just one thing clear on the record, that the government will not be permitted to introduce new issues in rebuttal other than to rebut what may have been said

by the defendant, within my understanding of the new rule.

THE COURT: Yes, I believe so.

MR. ENTIN: Thank you, your Honor.

THE COURT: 2:15.

(Luncheon recess.)

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2:15 P.M.

(In open court; jury present.)

THE COURT: The Government has not rested in the presence of the jury.

MR. LOWE: Yes, your Honor, the Government rests.

THE COURT: Ladies and gentlemen, now that all of the evidence is in, in this case, we have come to that part in the trial where the lawyers have an opportunity to give you their views of what the evidence shows and what it does not show.

That is called summation or final argument to the jury.

With respect to that I want to remind you of something I told you when the trial commenced, and that is that statements made by lawyers are not evidence.

The evidence in this case, as I have said, is now in, and again I remind you that the evidence in a case consists of three things: It consists of the testimony which you heard from the witnesses who took the witness stand right here before you, so you could hear them and observe them, and then the evidence consists of any exhibits which were actually received into evidence, and finally the evidence in a case consists of any stipulations,

agreements as to certain facts which the lawyers entered into, that is, certain facts, which lawyers agreed such and such is a fact, where there were no witnesses, or if the witnesses were called the lawyers would agree that certain things would be facts.

What the lawyers will do now is to give you their view what they feel the evidence shows and what it does not show.

With respect to that, I want to remind you that it is your recollection as the jurors in the case as to what the witnesses testified to or what the exhibit shows or does not show, and not the lawyer's recollection.

So that if during the course of the summation a lawyer says something which you do not feel is in accordance with a particular witness, then remember, it is your recollection which has to govern here and not the lawyers.

There is one final thing that I want to point out, and that is that sometimes during the course of closing argument we will get an objection from some lawyer with respect to the summation on the ground the lawyer making the summations is arguing the law to the jury and we will have a discussion about that.

If that should occur during the course of the summations here, I want to remind you again that after the

lawyers have had their opportunity to sum up, which will be the rest of the afternoon, and we will probably be here until about a quarter to 6:00, tomorrow morning the Court is going to charge you as to the law applicable to this case, and then you are to apply the law to the facts asyou find them.

With those preliminary remarks we aregoing to proceed now to summations and under our present procedure the Government will sum up first, and then the defense lawyers will sum up, and the Government will have an opportunity for rebuttal.

Are you ready to proceed, Mr. Lowe?

MR. LOWE: Yes, your Honor, I am.

THE COURT: All right.

MR. LOWE: May it please the Court, counsel for the defense, ladies and gentlemen of the jury:

As the Judge told you we are now at the point of the case where all the evidence is in, all the evidence that there is in this case is before you.

Hearkening back to my opening statement, all of the pieces of the puzzle have been spread out for you to consider. What I will do in the next 45 minutes or so, is go through the pieces with you and tell you how I think they fit together.

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There are some things in this case, ladies and gentlemen, concerning which there is little, if any, dispute. There is no real question that Eric Aiken took money, took a bribe for writing and publishing an article about Power Conversion in the September 29, 1972 issue of Selection and Opinion, the publication of which he was the editor.

There has been, and I will venture to say, there will be no dispute that Aiken did that. He has told you that he did it.

The essential thing that he did is really something that he didn't do. He didn't tell anyone, certainly not the subscribers and readers of the publication, that that article which purported to be the honest, independent, objective, unbiased opinion of an expert had been bought and paid for, paid for with $15,000 in cold cash.

That, ladies and gentlemen, is a fraud.

What Mr. Aiken did was wrong. But, as you have heard, Mr. Aiken didn't do this on his own. Indeed, it is impossible for Mr. Aiken to have done this on his own because Mr. Aiken could not bribe himself.

So, ladies and gentlemen, there really isn't a whole lot of dispute as to whether a crime was committed. The real dispute, the real issue in this case is who

did it.

The real issue for you to determine is whether or not Mr. Zammas here, and Mr. Rodman there, paid that bribe to Mr. Aiken so that he would publish that article and not tell anybody that he got a bribe.

What is the evidence? Let us start with Mr. Aiken himself.

Mr. Aiken told you that he had a history of corruption. A fairly substantial number of articles just like the Power Conversion article were published by him in return for bribes.

So, what happened? We find that Mr. Aiken gets a call or communication from his buddy, Stanley Perlmutter. Aiken tells us that his buddy Perlmutter says Thomas Zammas would like to talk to you about a deal for you to do anarticle on Power Conversion.

Now, something interesting happens here. Mr. Aiken initially says no. Now, that is not because Mr. Aiken wasn't greedy and didn't want money and it is not because he didn't want to violate the law.

We know from his own testimony that he was perfectly willing to violate the law.

No, ladies and gentlemen, the reason that Mr. Aiken said no was that he had a prior experience with

Mr.Zammas, back in 1970, roughly two years earlier, where basically the same kind of thing was done. Mr. Zammas offered to pay Mr. Aiken an amount of money for doing an article for money about a company called Casa Bella. After Mr. Aiken did the article, he didn't get what he was promised. He didn't get the full amount of the bribe that he had been promised.

So, Mr. Aiken, upon being approached again says, no way, I don't want to deal with Mr.Zammas, I don't trust him, he didn't pay.

Well, that is understandable.

But yous ee, Mr. Aiken and Mr. Perlmutter are greedy. So, Mr. Perlmutter says, "Look,Erick, we can make money on this deal, the stock is doing well, other people are writing it up, why don't you at least meet with Zammas, at least meet with him."

So, of course at this point, I guess, Mr. Aiken figures what have I got to lose by meeting with the man. And, he says, of course I stand to gain a substantial amount of money.

Now, you will recall that there is some discrepancy between Mr. Perlmutter and Mr. Aiken's testimony. Mr. Perlmutter recalled the first time he was approached by Mr.Zammas and the first time he approached Mr. Aiken

was early, spring or early summer 1972. Mr. Aiken says the first time he recalls being approached was in September.

Well,let me simply suggest this to you. No-one's memory is perfect. One thing that you can decide is that regardless when the initial approach was made, regardless of the timing of Mr. Aiken's arrival, both Mr. Perlmutter and Mr.Aiken agree on o-e thing, and that, ladies and gentlemen, is far more important than the initial approach.

They both agree that some day, evening, during September 1972, Mr. Perlmutter, Mr. Aiken and Mr. Thomas Zammas sat down at a restaurant on the east side of Manhattan.

Perlmutter can't remember the name of the restaurant. Mr. Aiken says that the restaurant was known as La Fortuna on East 41st Street. They both say they were there and they both say that Mr.Zammas was there, and they both say that at that meeting Mr.Zammas offered Mr. Aiken $15,000, and what Mr. Aiken described as an override on the stock which in fact was an additional way to make even more than the initial $15,000, if the stock went up after the article was published.

And they both agree that there was some discussion

about how could Mr. Aiken be sure, in light of the past history, that he was going to be paid, that he was going to get what he was promised.

Mr.Zammas,first of all, as you may recall, made some apologies and excuses to Mr. Aiken for what happenedin the past, and then he made the critical offer: We will give you a guarantee of payment. A guarantee. We will give you some cash ahead of time and we will give you 1000 shares of that stock, Power Conversion.

Now, recall the evidence, ladies and gentlemen. In September of 1972, that stock was selling for around $40 a share. A thousand shares at 40, is $40,000, more than twice the amount of money that had been promised. That, you may find, is a very good guarantee.

Mr.Perlmutter, having performed his function in this case, which was kind of to be the Mr. Interlocutor, from the old minstrel shows that you may recall. There were always two funny men, one on each side of the stage, and in the middle there was Mr. Interlocutor and they talked to each other through Mr. Interlocutor.

That was Mr. Perlmutter. That is his role. He is the man who brings the other two parties together so that they can communicate and execute this fraudulent plan for which he is handsomely paid.

Mr. Perlmutter leaves. Mr. Aiken and Mr. Zammas proceed to an apartment at 35th Street and Lexington Avenue, the apartment to which Mr. Zammas' girl friend said, "We had the key."

And when they get to the apartment, someone else is there. Henry Goldfarb, as I recall, from Mr. Aiken's testimony. So, you might find that because someone else was there, we had our little kitchen meeting.

This, ladies and gentlemen, is part of what I said to you when I originally spoke to you in this case. People who do these kind of things, do not do them in the light of day for all to see. They hide in thekitchen and they hide in the men's room. They don't do it out in the open.

Anyway, Mr.Zammas and Mr. Aiken are in the kitchen, Mr.Zammas gives Mr. Aiken a thousand dollars in cash and stock certificates for 900 shares of the stock. Of course 900 is not a thousand. A thousand was the deal.

Mr. Zammas tells Mr. Aiken, we will get you the other hundred soon.

Aiken says, it's okay, it doesn't matter really. And really, ladies and gentlemen, it doesn't, because at $40 a share, even 900 shares is a very good guarantee of $15,000.

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So Mr. Aiken pockets the money and takes the stock, and ladies and gentlemen, Government Exhibit 1B in this case, there is the stock. Do not forget, please, that that stock is in the name of Mr.William Rodman. Not only is it in his name, it bears his signature. More of that in a moment.

What does Mr. Aiken do? Mr. Aiken doesn't even go right home. He goes to a bar and meets Mr. Lettieri. You will remember Mr. Aiken said, "I lent Mr. Lettieri $500 in cash." Mr. Lettieri came up here and said yes, one night, around September or so of '72, Eric Aiken laoned me $500 in cash.

Obviously, Mr. Lettieri can't tell us where Mr. Aiken got that money. Obviously Mr. Lettieri doesn't know anything about the facts. At least from his testimony, you can conclude that he doesn't.

But where do you suppose Mr. Aiken got $500 in cash in a bar at night unless he got it, as he said he did, that night from Mr.Zammas in Mr.Zammas' kitchen.

And of course that is not all that happens. The next thing Mr. Aiken tells us about is that he wrote the article, went through the whole mechanical process of getting it published, and ladies and gentlemen, Government Exhibit 1E, the September 29, 1972 issue of the Value Line

Selection and Opinion.

Nowhere in the article about Power Conversion is there any disclosure, any mention, any hint that Mr. Aiken had received $1000 and was about to receive 14,000 more for recommending this stock, for touting it, ladies and genntlemen. That is just what it was.

Do you remember Mr. Aiken told us that he and Mr.Perlmutter were involved in touting horses at the trotters, that they published a sheet recommending what horse to bet on? That sheet was perhaps worth more than this article on Power Conversion, because this article on Power Conversion, ladies and gentlemen, is a fraud because it is a paid for advertisement, but nobody knows that, no one is told.

Let me show you something in this article. As part of the article mention was made of the fact that a company called Chromalloy American was the major customer of this Power Conversion, and possibly for that reason or probably for that reason there is a little box on the article on page 247, outlined in blue, where they write a little bit about Chromalloy-American Corporation.

MR. ENTIN: Your Honor, I am going to object. That article is not in evidence and that magazine was not put in evidence for everything therein, but only for

the Power Conversion article.

I ask this box be excised.

MR. LOWE: At the time this was offered in evidence it was offered in general and there was no objection to it and the Government is entitled to comment on whatever is in this publication.

THE COURT: Yes, overruled.

MR. LOWE: There is a brief little summary about Chromalloy. At the bottom of that summary there is a note. It says "An investment company of which Arnold Bernhardt & Company, Inc. is an investment manager and advisor, holds in its portfolio of this issuer, having a market value in excess of $75,000."

Ladies and gentlemen, that is so that the people can evaluate what is being said about Chromalloy because they know that the people who publish this paper have an interest in Chromalloy, so that maybe what they are saying about Chromalloy might be affected by that interest.

It might not be but it might be, and it is something that the publishers of this publication deemed important enough for thepublic to know that they print it.

How much more important, ladies and gentlemen, was it for the public to know that $15,000 in cash had been paid for the Power Conversion article itself?

Having gotten the article produced and published, we find Mr. Aiken telling us that he is on the telephone with Mr.Zammas again, and he says to him, "It's done."

Mr. Zammas says, "Great. When can we meet?"

And we have this cute little conversation about we can't meet tonight because I am taking my fiancee to the opera, etc.

And one way or another they come around to the conclusion that there is enough time after the opera to meet.

You might find from that, ladies and gentlemen, that Mr.Zammas is rather eager to get his hands on this article. You will recall Mr. Aiken told him he had six samples for him, and he is willing to wait until rather late in the evening to see Mr. Aiken, rather than wait perhaps until the following day, and in a moment I will give you an idea of just why he was in such a hurry.

In any event, ladies and gentlemen, they decide that they will meet at The Ground Floor Cafe in the CBS Building on 56th Street, in Manhattan.

Now, this is one of those fortuitous times at which several people were there, several identifiable people: Mr.Zammas, according to the testimony was there,

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Mr. Aiken, according to the testimony was there, and so were Susan Robbins, now Susan Aiken, and so was Stephanie Palumbo, the Government's last witness.

1A

I think, ladies and gentlemen, that there can be no doubt that that meeting took place.

Once again, though, we see the hallmark of fraud. Despite the fact that they were sitting at a table in a restaurant with oen man's fiancee and one man's girlfriend, Mr. Zammas nevertheless found it necessary to go to the men's room with Mr. Aiken in order to conduct business.

Now, why do you suppose he did that? Do you suppose it's because he didn't want anyone to know that he was giving Mr. Aiken $14,000 in cash? Do you suppose he was trying to hide that fact, even from his own girlfriend, even from the wife-to-be of the man he was then bribing.

So they went to the men's room, and in the men's room Mr. Aiken told us, "Mr. Zammas gave me $14,000 in an envelope and he gave Mr. Zammas several copies of the article in an envelope."

Now, what do we know from the women, the two ladies who testified? They didn't see the money change hands. But we do know that everyone was there, and we do know that Mr. Zammas and Mr. Aiken left the table, and we also know that they left the table, ladies and gentlemen, for a long enough period of time

that Susan apparently threw a fit, became so upset about the length of time involved that she embarrassed Stephanie Palumbo by her behavior.

You saw Mrs. Ziken and you saw Stephanie Palumbo, and I ask you: isn't that pretty easy to believe that just something like that could have happened?

Ladies and gentlemen, they didn't go to the men's room to go to the men's room. It doesn't take that long. They went there to do exactly what Mr. Aiken said they went there to do, and that is to make the final cash payment of the bribe, and is what Mr. Aiken said happened.

What else do we know from the women? We know from Miss Palumbo Mr. Sammas didn't tell her why they were going there, what they were doing there or anything.

We know from Susan Aiken, however, a little bit more.

First of all, ladies and gentlemen, we know that when they left the opera, Susan Aiken said that Eric told her not only that they were going to The Ground Floor Cafe but why, that they were going to The Ground Floor Cafe to meet Mr. Tom Zammas, to get from Mr. Zammas

the money Mr. Zammas was to pay Mr. Aiken for the article about Power Conversion.

Now, what is the significance of that, ladies and gentlemen? It is this: Mr. Aiken, as you will be told, I am sure, extensively by the defense lawyers, is now in a position where he is trying to make us, the United States Attorney's Office, like him because he has been caught. And the argument goes something like: he is just making things up to make us happy.

Well, do you suppose, ladies and gentlemen, that on September 28, 1972, in the midst of committing the crime itself, he had any reason to lie to his fiancee about what was going on? Way back then he said just what was happening, and it is the same what he said happened when he testified here today.

What else does Susan tell us? Susan tells us that they left the restaurant and at the time they left the restaurant Mr. Aiken showed her the envelope bulging with money. And she said that when they got to the restaurant he didn't have it with him. And how did she know that? Because it was so fat it made his coat bulge out, and it didn't bulge out when they got in the restaurant.

Based on that, ladies and gentlemen, unless

you believe there was somebody else in that men's room, there is little or no explanation for what happened other than, as Mr. Aiken testified, Mr. Zammas gave him that money.

And we know, Mr. Aiken, although a crook -- and make no mistake about that: he was a crook -- was apparently a fairly generous man, because he gave the proceeds away, or a good deal of them. He gave Susan $2000, he gave Stanley $3500, plus forgiving Stanley what he owed him, and, ladies and gentlemen, he gave Dan Lettieri a loan of $2000. And remember what Mr. Lettieri said? "He came in the bar that night, after he had given me the $500, and he gave mr $2000 in cash."

Where do you suppose he could have gotten that money, other than as he said he got it, from Mr. Zammas that very night? And, ladies and gentlemen, here is a piece of paper written by Mr. Lettieri to the effect that he owes Eric Aiken $2500, Government's Exhibit 6A.

Now, ladies and gentlemen, this case is somewhat like a casserole. It has a lot of different ingredients to it and it also has several different people involved in the preparation and serving of it.

Mr. Rodman might best be com pared to the chef in the kitchen. Mr. Rodman was in the kitchen

back where no one was watching him, no one could see what he was doing, and he was the chef. He had the recipe before him.

Mr. Zammas you might think of as the chef's helper, who, among other things, went out to the supermarket to buyt he necessary ingredients for the dish that Mr. Rodman was planning to serve up.

We don't know as much about Mr. Rodman as we do about Mr. Zammas, but we know enough. We know, ladies and gentlemen, that Mr. Rodman and Mr. Zammas did not bump into each other on a street corner and say let's bribe Eric Aiken. We know Mr. Rodman and Mr. Zammas, from the testimony of the various witnesses in this case, were working hand in glove together, marketing the stock of Power Conversion. This was their baby. They were working on it most of the time.

To give you an example of the amount of work being done, the records of C. I. Oren, the brokerage firm that employed Mr. Rodman as a trader, customer's man and registered representative, in the space of August 1st to October 6th, had 125 sales transactions in that stock. They had 295 different purchase transactionsd in that stock. The number of shares sold by C. I. Oren was 129,000. The number of shares purchased

was 96,000.

And Mr. Lindsay, who worked at C. I. Oren, tells us something, that 90 per cent of those transactions were directly connected to Mr. William Rodman.

Mr. Rodman was the dealer in securities. Mr. Zammas was his helper.

Mr. Aiken was like the additional ingredient for the casserole. He was kind of the little bit of difference that makes it a special casserole.

Mr. Rodman, do you remember what Mr. Aiken said about him, reputred to be the Babe Ruth of Wall Street. Most of you must remember Babe Ruth, or at least know who he was. Among other things, Babe Ruth was really a great hitter, a slugger, a really heavy hitter, and a winner.

I guess what was meant by comparing Mr. Rodman to Babe Ruth was to indicate that Mr. Rodman also was a slugger, a heavy hitter, a winner. But you can find from the evidence in this case, ladies and gentlemen, that there is a big difference between Babe Ruth and Billy Rodman, and that difference, ladies and gentlemen, is that from the evidence in this case the only way Billy Rodman can approach Bage Ruth is to pay off the pitcher, because that's just what the evidence in

this case shows he did.

Mr. Wymbs. Mr. Wumbs is a real winner. You will hear a lot from the defense lawyers about Mr. Wumbs, what a jerk he is and what a crook he is, and I'm quite sure one or the other defense lawyers is going to suggest to you that Mr. Wymbs is also a liar.

Mr. Wymbs, however, told us- that he heard conversations to which Mr. Rodman was a party, and to which Mr. Zammas was a party, and to which Mr. Rodman's girlfriend, Darnice Gennaro was a party. These conversations centered around paying off Eric Aiken for that article of Power Conversion. Not onlythat, ladies and gentlemen, Mr. Wymbs saw money, green, cash money. He says he saw $5000. You might find that that was Mr. Rodman's contribution to the kitty.

And, ladies and gentlemen, Mr. Wymbs was not a casual buddy; Mr. Wymbs was doing a lot of interesting things right at the same time, and thereafter. Mr. Wymbs wasn't all that honest himself. But why do you suppose that Mr. Wymbs was even there? Do you suppose that at the time back in 1972,when he could be useful to them, Mr. Wymbs was welcome despite the fact that he was a crook? Perhaps, ladies and

gentlemen, even because of the fact that he was a crook. And now, of course, Mr. Wymbs is testifying about what went on, and that's different. But, ladies and gentlemen, when you deal with crooks and when crooks deal with each other, that's the way it happens. You can't expect honest people to cooperate in fraudulent activity. You have to get people who are crooks to help you when you are planning to pull off a fraudulent scheme.

We also know, ladies and gentlemen, that Perry Constantinou, another crook, he is on the phone to Billy Rodman, he meets Billy Rodman and they eat. Mr. Constantinou seems to think this whole thing occurred in August or the summer or whenever. And you might find: gee, it's kind of hard to see how this could have happened then. And you are right. But it is not all that hard to figure out that maybe Mr. Constantinou got his dates a little mixed up because this event was of no great significance to Mr. Constantinou. Because, if you will recall, he didn't getwhat he went for. He went to get Babe Ruth to help him hit a home run with his stock of Fantastic Fudge, which he told us, ladies and gentlemen, was a fraudulent deal. In the course of the conversation he said, "Can you help me?"

and Mr. Rodman says, "Gee, I'd like to help but I can't because I'm up to my neck in Power Conversion and I'm busy in that. But when I get that straightened out, maybe I can help."

Mr. Constantinou, recognizing the fact that Mr.Rodman has been successful in promoting the stock of Power Conversion up to that point, recognizing the fact that he has been unsuccessful, asks the Babe for some tips on how to hit him out of the park, and what does Mr. Rodman tell him? Mr. Rodman tells him, "I got a lot of buying power and, among other things, I'm getting an article about the stock in Value Line." And Mr. Constantinou says, "Gee, Babe, tell us how you do it."

Mr. Rodman makes us slick, ladies and gentlemen, because Mr. Constantinou was able to come in here and testify that Mr. Rodman in effect told him, "I hit a home run because I paid off the pitcher." Mr.Rodman said, "It cost me."

Now, you recall the cross examination. "Did he say it cost him money, cost him stock?" Mr. Constantinou just said, "He said it cost."

Now, ladies and gentlemen, what do you suppose it cost? What other reasonable interpretation

of the expression "it cost" is there other than to say, "It cost me money"?

By the way, if Mr. Constantinou was making up a story to please us, don't you think he could have said, "Yes, Mr. Rodman said he paid him money," but he didn't. And you might find from that that he is telling the truth because he doesn't add anything that might be helpful. He just says it the way he remembers it: "It cost."

Then, ladies and gentlemen, we here from Alan Umbogy, another crook. I told you right in the beginning that this case was a pack of thieves, and it was.

Alan Umbogy. Isn't it interesting, one little point about Mr. Umbogy's testimony tends to corroborate what Mr. Constantinou said. Mr. Umbogy said that among other things Mr. Rodman asked him whether or not he should get involved in Fantastic Fudge stock with Perry Constantinou. Do you suppose, ladies and gentlemen, that the reason he asked Mr. Umbogy was because he had had that meeting with Mr. Constantinou that Mr. Constantinou testified to at which Mr. Constantinou asked Mr. Rodman to get involved? And why didn't Mr. Rodman get involved? What did Mr.

Umbogy tell Mr. Rodman? Mr. Umbogy said, "Bill, stay away from that one, it's under investigation by the SEC." Not: Bill, stay away it's a fraud. But: Stay away, it's a fraud that's about to be caught.

And Mr. Rodman was not about to take that kind of a risk.

What does he tell Mr. Umbogy when they meet? He tells Mr. Umbogy, "We got this terrific article coming out and Value Line is going to buy some of the stock. And how about buying a batch for yourself right now to help me get the stock moving up before this other buying takes place?"

Umbogy, crook that he is, is also no dipe. He is really not buying Mr. Rodman's act because, as he put it, "I guess if I believed in it I would have bought the stock," but he didn't. But he does agree with Mr. Rodman to talk about it some more.

And they meet, Mr. Umbogy says, and lo and behold, who is there when they meet? Tom Zammas, the helper.

They meet in Wolf's. They sit down for breakfast, coffee, whatever, and at that point Mr. Rodman says to Mr. Umbogy, "Tom just completed the arrangements for having this article published and it's going

to hit the street today."

Now, what do you think about that, ladies and gentlemen? September 29th was the day the article hit the street. That's the date on the article. September 29th, at 11 o'clock at night, in the john at The Ground Floor Cafe, Tom Zammas completed the arrangement.

By the next morning Billy Rodman knew about and and he had a copy of the article. And if that doesn't convince you that Billy Rodman was involved in this thing just as much as Mr. Zammas, I don't know what will. Because, ladies and gentlemen, between 8 o'clock at night and about 8 or 9 o'clock in the morning there wasn't a heck of a lot for Mr. Rodman to find out what was going on unless he had Mr. Zammas telling him what was going on, and that's, ladies and gentlemen, what you can find happened.

Mr. Umbogy produced, right here in court, the copy of the article that Billy Rodman gave him, and there was a lot of jazz on the cross examination, ladies and gentlemen, about a fellow named Tom Doonan from the United States Attorney's Office and there was a suggestion, innuendo, in that cross examination, Tom Doonan, having been left alone in the file, had an opportunity

to plant something in that file.

MR. BERGER: Objection, your Honor. No such innuendo. If the jury got that opinion, then it is mistaken. It was never intended.

MR. LOWE: I will leave that up to your recollection of the cross examination, ladies and gentlemen. The simple fact is there was never any evidence that anything like that ever happened.

But here is something even more interesting. On the back of Government's Exhibit 10A, the article Mr. Umbogy testified he got from Mr. Rodman, there is something written in in handwriting. Mr. Umbogy said that he knows that's Mr. Rodman's handwriting because he saw Mr. Rodman write on this paper, and there it is.

Ladies and gentlemen, before I close, let me now address myself to what I consider to be the critical issue in this case, and that is the credibility of the witnesses produced by the government to produce its case. There is no question, and at no time did anyone attempt to convince you otherwise, that the essential critical witnesses in this case, without exception, are crooks. And there is an argument to be made, ladies and gentlemen, and I assure you it will be made, that you should not rely upon crooks to convict these

gentlemen, Mr. Rodman and Mr. Zammas, because, after all, these are people who have lied in the past, who have cheated in the past, who have stolen in the past, who have committed fraud in the past. These are not nice people, ladies and gentlemen; these are really bums.

You know, ladies and gentlemen, as I told you in my opening statement, nice people have no way of knowing what's going on. Nice people are the poor people who subscribe to this publication, who get it, read it, perhaps rely on it without being told that it is a fraud, so they don't know it's a fraud and they can't come in and tell you that was a fraud because they don't know that. The only kind of people who find out about the frauds while they are happening are people who are involved in them, and when you are involved in a fraud, you are a crook.

T2 pm

Ladies and gentlemen, if this case were all about what goes on in St. Patrick's Cathedral, we could call in Cardinal Cooke, a whole bunch of archbishops, a few priests and nuns, all of impeccable character, to tell us what's going on in St. Patrick's Cathedral. But in this case, ladies and gentlemen, what goes on in St. Patrick's Cathedral has no meaning, it is irrelevant. This case, ladies and gentlemen, is about what goes on in the sewer.

Ladies and gentlemen, when you start out investigating a sewer, usually the very best witnesses you can find to tell you what goes on in the sewer are the rats who live there. That's why they are here, ladies and gentlemen. And I suggest to you that you had an opportunity in this case to see just why it is necessary for the government to make deals with these people, to make agreements with them, to give them something in return for getting their testimony.

Do you recall when Mr. Perlmutter was on the stand testifying? He was asked questions about other things he was involved in. And remember, his deal is that if we get evidence he was involved in other things, he will be prosecuted for those other things. So what did Mr. Perlmutter do from that

witness stand? He refused to answer the question, and nobody in our society can make him answer those questions and thereby hang himself. That's the kind of society we have. That's the meaning of the Bill of Rights of our Constitution. No man can be forced to turn witness against himself.

So, ladies and gentlemen, when you have a pack of people, all of whom have every reason in the world to want to hide what happens, you have to get a hold of some of them and get them to tell you about what the rest did.

And since we can't force them to do it, we have to bargain, and in bargaining we give away something. We give away the possibility of punishing these men over and over and over again.

But we get something in return. What we get in return, ladies and gentlemen, is the ability to expose the fact that Eric Aiken is not the criminal in this courtroom. Eric Aiken took the money, published the article, committed a fraud. No question about it. But he is not the only one.

From the evidence in this case you will find Mr. Zammas and Mr. Rodman also did it, and unless we can get Mr. Aiken to come up and tell us about it, how

are we going to find out?

Ladies and gentlemen, I am going to have an opportunity, after the lawyers for the defendants speak, to answer whatever arguments they make, to reply to them. I wish that I had the opportunity to have you raise your hand and ask whatever question you have and have it explained and answered. That's not the way it works.

I hope at this point I have laid out and put together for you the pieces of the puzzle in such a way that it spells out for you clearly and precisely, and beyond a reasonable doubt, ladies and gentlemen, that Mr. Zammas and Mr. Rodman are guilty of the charges in the indictment in this case.

Thank you for your attention.

THE COURT: Thank you, Mr. Lowe.

At this time we will take a five-minute recess.

The jury is excused for five minutes.

(The jury left the courtroom.)

(Recess.)

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(In open court; jury present.)

THE COURT: Mr. Berger, you may proceed.

MR. BERGER: Judge Motley, Mr. Lowe, Mr. Shaeffer, Mr. Entin, Mr. Kimler, Mr. Wyka, ladies and gentlemen:

I first wish to take this opportunity to thank you for the effort and attention you have shown, serving as jurors in this case. I know that it is a difficult case, complicated case, and Mr. Rodman and I really appreciate the attention that you have given the facts and the witnesses.

It's a strange thing that sitting there as jurors is an obligation, an obligation as an American citizen, and yet being a juror and having a jury is also a right. And the way this right came about is quite interesting, because though it is a right, it is also a concurrent obligation.

In the year 1215, in England, the clergy and the barons put an army together, an army to go against King John, who had replaced Richard the Lion Hearted. The reason they put that army together was that King John, unlike good King Richard, had taken away the rights of the people, and for the first time in the history of mankind a king was forced to put his

name to a charter, he was forced to give rights to the people. And that charter is the Magna Carta, the great charter. And there were 63 articles in that charter, and one of those articles was the right to a trial by a jury of your peers, a right that never existed before the Magna Carta. It was such an important right that the people were willing to go to war over it.

It seems strange that people would go to war over a right which is an obligation. But that's what makes the American system of jurisprudence, the fact that we have a jury, the fact that unlike the days of King John, justice can no longer be bought and sold; justice is up to the people, to each and every one of you.

Now, Mr. Lowe said that this type of crime, you have to use crooks to prove your case. Well, whether you have to use crooks or not, it is you, the jury, that have to determine what was the motivation for their testimony and were they telling the truth.

When you look at the title of this case, the United States of America vs. Zammas and Rodman. What a frightening title. That's enough to scare anyone half to death. The United States of America

versus. It sounds like a war.

Well, let's remember one thing, that those witnesses sitting up there and testifying do not represent the United States of America. The United States of America does not guarantee the truth and veracity of those witnesses.

Mr. Lowe, the United States Attorney's Office, does not guarantee th truth and the veracity of those witnesses. It is not the United States Government testifying.

It was Wymbs that was testifying. It was Constantinou that was testifying. It was Umbogy that was testifying.

Now, I agree with Mr. Lowe. They are rats, and they are cunning, and they would use the government as fast as they would use anyone else.

They weren't testifying because they were rehabilitated. They weren't testifying because they were good citizens. They were testifying because they wanted to get something out of it.

Now, I don't say that Mr. Lowe knew or that the U. S. Government knew what their motivation was, and I don't say that Mr. Lowe or the U. S. Government knew when they were lying. That's defense counsel's

job to bring out to the jury those facts which would indicate that the particular witness is lying.

Let me say this. Those witnesses knew what the government wanted. They knew what cooperation meant. They knew what Mr. Lowe believed, and they knew that in order to cooperate they had to put together a story that Mr. Lowe could buy.

The defendants in this case come into the case with a presumption of innocence. Now, that's not a mere legal fiction; that's a fact. They are presumed innocent, and they are presumed innocent during every part of the trial up until and including the time you go into that jury room and up until the time that you beloeve beyond a reasonable doubt that they are innocent.

Now, that is an onerous task. Beyond a reasonable doubt, that is the government's burden. The defendants have no burden. The Constitution says they have no burden. They do not have to prove anything. They can go just by the presumption of innocence.

But if I were to say to you, "Did you ever smoke a cigarette?" could you prove that you never smoked a cigarette?

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If I were to say to you, "Did you ever go to California?" could you prove that you never went to California?

That's a negative.

There is no burden at all on the defendants.

The next thing I wish you would remember, and I plead with you to remember during this trial, is that although there are two defendants sitting here, they are separate individuals. You must give each one individual attention. You must look at the facts as to each one. You do not convict a man on innuendo, on inference, on what could have been or what maybe was or what he might be thinking. You convict a man on one thing: cold, hard fact, nothing else..

There has been a lot of innuendo in this case. There has been a lot of hearssy in this case. I beg of you, when in that jury room, and going over the evidence in this case, think how is it to be judged by what somebody said you said when you weren't there.

Something like playing Simon says. Simon says take three giant steps. That's fine. But if John says: John says Simon says, that's not good, unless Simon was there with John at the time.

No one should be held responsible for what

the next person said he said unless he was there to either admit it or deny it.

At one time, in the opening of this case, Mr. Lowe said, "Why is Billy Rodman here?" Then he went ahead and said what he was going to prove, and he listed witnesses. One of the witnesses was Robert Wymbs. Robert Wymbs was going to prove that Mr. Rodman had a discussion with Mr. Zammas about this pay-off. Well, I'm going to get back to Mr. Wymbs.

Let's start off with the beginning of this case. Let's start off with Mr. Perlmutter. Mr. Perlmutter had no discussions with Mr. Rodman, none whatsoever. Now, he had no reason to lie. He testified that he didn't make a deal with Mr. Rodman.

Then we go to Mr. Aiken. Mr. Aiken testified that he had no conversations with Mr. Rodman. However, three shares, three certificates of stock, with Mr. Rodman's name on it, yes, three certificates of stock bore the name William Rodman.

That reminds me of a story. There was this little boy. He had a very bad habit, two bad habits. He would always lie and he would always come home from school late. So one day his father says to him, "Son, if I catch you lying again, or if I catch you

coming home from school late again, you are going to be punished."

The little boys says, "Dad, I promise, I'll never lie again and I'll never come home from school late again."

What happened the following day? He came home from school late. His father meets him at the door and he says, "Son, I told you if you ever lie again or come home from school late again you are going to be punished. Now, you tell me why you came home from school late."

He says, "Dad, it wasn't my fault, I couldn't help myself."

He said, "Remember, Son, you have come home from school late, don't lie. Why were you home late?"

"It really wasn't my fault, Dad. I cut through the woods on the way home from school and this big bear got in front of me and I tried to get around him and I tried to go to the left and I tried to go to the right, but I couldn't get away from that bear, so I ran and the bear chased me and it finally cornered me, and I picked up a stick and hit that bear and I hit that bear until I killed him, and, Dad, that's why I'm home

late."

The father says, "Son, not only did you get home from school late but you lied."

The little boy said, "Dad, I didn't lie. I can prove I killed that bear. Here is the stick."

Well, ladies and gentlemen of the jury, the government has shown you the stock in the place of a stick. It doesn't prove a thing. It doesn't prove that Rodman killed that bear. It doesn't show you broken, bloodied bear. It showed you the stick.

Mr. Aiken testified that he met with Mr. Zammas. He testified that up until the time of that meeting, which is around the 15th of September, 1972, he had had no discussions with Mr. Zammas. There was no discussions of cash, there was no discussions of collateral, there was no discussions of stock, there was no discussions with Mr. Zammas.

Now, what else did he testify to? He testified that he left that meeting with Mr. Zammas. He also testified that Mr. Zammas was with him all the time. He also testified that Mr. Zammas did not make any phone calls and did not speak to anyone. He also testified that when he got to the apartment, Mr. Rodman was not there.

Now, I ask you, ladies and gentlemen of the jury, if Mr. Rodman had given this stock to Mr. Zammas for the purpose of Mr. zammas giving it to Mr. Aiken, would Mr. Rodman have to be a mind reader? It is obvious that Rodman did not know that stock was being given to m Mr. Aiken. He had no opportunity to know it. He wasn't asked about it, and there is no evidence, not one iota of evidence at this trial, to show where Mr. Zammas got the stock. That stock was endorsed, it was negotiable. It could have gone through a hundred hands before it ever got to Mr. Zammas or to Mr. Aiken, and even Mr. Aiken testified that he could have negotiated through a hundred more hands and it would always bear the name William Rodman, the same as you take your pay check, sign the back with your name, you give it to somebody to cash, and they take it and they give it to somebody else to cash it and they take it and give it to somebody else to cash it. You only need that one endorsement, your name on the back of the pay check. The government has not shown that this stock went from Mr. Rodman to Mr. Zammas to Mr. Aiken. And what's more important, it was impossible for this stock to have gone from Mr. Rodman to Mr. Aiken as collateral on this deal because the evidence shows that the only two

people that knew of the deal at the time the stock was transferred was Mr. Aiken and Mr. Zammas. That's the only testimony there is.

So I tell you, ladies and gentlemen of the jury, when you think of that stock, think of a stick.

Mr. Aiken testified that this deal took place around the middle of September. That's an important date for you to remember, the middle of September, because you will find that other witnesses testified as to conversations with Mr. Rodman at other dates. And remember how these witnesses testified, how they remembered specifically dates, but couldn't remember anything else. The date September 15th is an important date.

In addition to that, with regard to whether other witnesses were lying, Mr. Aiken testified that he never spoke to Mr. Rodman. Mr. Perlmutter testified that he never spoke to Mr. Rodman. Mr. Wymbs testified that Mr. Rodman was on the telephone almost every other day calling somebody at Value Line to find out when the article was going to be ready.

Well, I submit to you, ladies and gentlemen of the jury, somebody is lying. Is it Mr. Aiken and Mr. Perlmutter, or Mr. Wymbs?

How could Rodman have been on the phone as testified to by Wymbs, calling to find out about delivery or an article when Aiken and Perlmutter said they never discussed it. And what reason would they have to protect Rodman? Why should they lie about that?

I submit to you, ladies and gentlemen of the jury, that there was a lie, and a lie was a vindictive lie, vindictive by Mr. Wymbs.

I would like to discuss Mr. Wymbs a little bit.

Mr. Wymbs testified that he heard a number of conversations between Mr. Rodman, Mr. Zammas, Darnice Gennaro at an apartment. He had never told the United States Government, and I asked him this on cross examination, prior to February 20th. Now, he wrote a statement on February 21, 1975, in which he said that he overheard a conversation between Mr. Rodman and Mr. Zammas concerning a payoff on Power Conversion and Value Line. Now, he met with the government many times before that.

During the trial he testified that he saw Bill Rodman give cash, $5000 cash, to Darnice Gennaro and say it was for the payorf. He never told that

to the government. That wasn't in his statement. And when Mr. Lowe questioned him and said, "Does this statement contain mostly everything said?" he said, "Yes," he didn't change his testimony, because that is all he said. He got up here on the witness stand and he lied.

He also lied about the conversations between Mr. Rodman and somebody at Value Line. That should be obvious.

He was not testifying because he was a public-minded, public-spirited citizen. He was testifying because he was in trouble, he was under investigation.

How many times did I ask him, "Were you under investigation? Did you believe you were under investigation?" And what did he say? "No."

Do you believe that Wymbs did not know that he was under investigation? You don't go to the U. S. Attorney's Office, you are not called to the U. S. Attorney's Office for no reason whatsoever. He knew he was under investigation.

And then I said to him, "Did you manipulate a certain stock?" and what did he say? "No."

Then I said to him, "Did you manipulate that

stock?" and what did he say? "No." But Mr. Lowe knew that he manipulated those stocks and Mr. Lowe, as a member of the U. S. Attorney's Office, in good faith and good conscience, knowing that Wymbs was lying, stood up and forced him to admit that lie.

So I'm not saying to you disbelieve Wymbs because he was a crook; I say to you disbelieve Wymbs because he is a liar.

Not only that, in the vernacular, he is a wise guy.

I said to him, "Mr. Wymbs, did you ever warehouse that stock?"

"Warehouse? I'm a businessman, I warehouse forms. I don't know wehat you are talking about, Mr. Berger."

What did Mr. Lowe do? Again, he made Mr. Wymbs admit he was lying and being cute when he said, "I don't know what warehousing means."

Not only that, but 20 minutes later, after he said he didn't know what warehousing meant, he used the term in his testimony. Why did Wymbs tell you that he had no animosity for Bill Rodman? Because he wants Bill Rodman convicted.

Fortunately, again, Mr. Lowe, the United

States attorney, knowing that he was lying, said to him, "Is it true you have no animosity?"

He says, "I hold him in disdain."

But before that he had told you flippantly, "I was out in the hall, I shook hands with Bill Rodman."

He was lying for one reason: to mislead you. He didn't want you to know he was prejudiced or had hatred or dislike or held in disdain Bill Rodman. And the reason for that was he knew that his prejudice, his hate, his dislike would be weighed by the jury in evaluating his testimony.

Another thing about this good samaritan, this good citizen. He was willing to cast stones at Bill Rodman, but when it came to his potential criminal liability, what did he do? He lifted a shield and protected himself: "I refuse to answer on the ground it might incriminate myself." Does that sound like a good citizen who was here to see that justice is done? From 1969 to 1974 he raised the shield, but he cast the stone at Bill Rodman.

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And then what happened? I went ahead and I asked him: "Did you have an illegal arrangement with AmericanExpress?"

What did he do then? This honest witness, cooperating with the Government, cleansing his soul, doing the right thing, raises the shield again and then throws another stone at Bill Rodman.

Then I asked him, "Have you ever been convicted of a crime?" And he says to me, "No."

I go to Mr. Lowe, I shake my head, because I know he has one. Mr. Lowe says to me ask him this question. And I said to him, "Did you ever plead guilty to a crime?" And he said yes.

When you plead guilty to a crime the Judge tells you it is the same as being convicted after trial, and he knew it. But, again he was being cute, he was being smart.

I asked him when he was convicted. Imagine being convicted of a felony, which is a horrible thing, being convicted of a felony, and he didn't remember the date he was convicted.

But he remembered every conversation he had or overheard, and then some, with Bill Rodman. But the date he was convicted.

So, trying to find that date, what did we do?

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We went ahead and we asked, "When was your probation up?"

He says, "My probation was two years, it should have been up in July, but it was cut short because I was a model citizen."

Get that, "model citizen." For the very years he was on probation, when it came to his tax return, up went the shield. Model citizen.

I have to look over my notes with Mr. Wymbs. I just don't believe that he is credible. But more important than that, I don't believe that any one of you can rely upon his testimony beyond a reasonable doubt. Beyond a reasonable doubt, no way.

Would you rely in those decisions most important to you in your everyday life as to what you were told by Mr. Wymbs, knowing what you know of Mr. Wymbs and having had the opportunity to look at Mr. Wymbs and watch him dual with me and lie.

I submit, ladies and gentlemen of the jury, I have spent too much time on Mr. Wymbs.

Periclese Constantinou. Again, a convicted felon. But that isn't the worst of it because a convicted felon can tell the truth. He can. You have to sit there, you watch him and you listen to him to determine whether

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he is telling the truth. The fact that a man is a convicted felon doesn't mean that he is going to lie.

But, let's look at his past behavior. He is an admitted perjurer. That is different than being a convicted felon . He admitted to you, ladies and gentlemen of the jury, that he perjured himself back, I believe it was 1972, at a SEC investigation, and what is interesting, why did he perjure himself? And one of the reasons was not to get involved in a criminal matter, not to have the liability of going to prison.

Now, any man that tells you that he wants to go to prison is a liar. Constantinou admitted at least that he didn't want to go to prison. But, he lied back in '72 to stay out of prison. He is a shrewd man. He knows what the Government wants. The Government didn't have to tell him what it wanted. He knew. He was on the street. He knew what the Government wanted. And, as a matter of fact, he said that Mr. Lowe indicated to him that testifying against William Rodman would be considered Government cooperaation.

Is there anything that you saw with respect to Mr. Constantinou which would lead you to believe beyond a reasonable doubt that he would not lie again in order to stay out of prison? Are you willing to convict Bill

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Rodman on the testimony of someone who has admitted that he has lied to stay out of prison?

In addition to that, Mr. Constantinou is not done with the Government yet. He has other matters pending, and he has agreed to plead guilty to some future indictment. He has agreed to plead guilty . He hasn't been told what he is going to plead guilty to, but there is plenty for him to plead guilty to. And he knows that unless he gives the Government something, unless he trades with the Government, he is not going to get the recommendation he wants.

You know, sometimes you are better off when you are a man like Constantinou, robbing ten banks instead of one and having ten accomplices instead of none, so that when they catch you on one bank robbery, you can say, hey, hold on now, let's make a deal. I did ten more, and there were nine guys with me.

And don't you think a man like Constantinou if he didn't do ten robberies and didn't have ten accomplices, so what, a little white lie, say I did ten, Rodman was with me. Let me off and I will give you Rodman.

Constantinou was caught redhanded. He would have a felony conviction. Why not trade? We will take Rodman. That is the way the mind of a Mr. Constantinou

works.

It is unfortunate that the more crimes you commit, and the more accomplices you have, the easier it is to get away with them. It really is the easiest way.

Perlmutter. He was a minor participant. That is what it said in his plea bargaining agreement. Involved in over six deals, bagman for Aiken, he is a minor participant. That is not a bad deal.

Can you imagine if Perlmutter didn't have Rodman to testify against? Would he still be a minor participant? I doubt it.

If Perlmutter didn't have Rodman to testify against, we would have Aiken testifying against Perlmutter because they wouldn't make a deal with Perlmutter.

I tell you that Constantinou cannot be believed beyond a reasonable doubt. You can't findRodman guilty on the testimony of a Constantinou and a Wymbs, and in good faith, in good conscience say these are facts which I believe beyond a reasonable doubt.

Umbogy. There is a winner. He made a deal with the Government back in 1972, on a stock fraud to be named on a future indictment. They listed six stocks that this man manipulated. His agreement was, he will plead guilty to one count of one stock fraud, and everything else.

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That is not a bad deal.

It seems to me that Umbogy also testified that he wasn't interested in limiting his liability. He just wanted to tell the truth. And, when I asked him whether a recommendation from the United States Attorney's office was important to him to a sentencing Judge, he said no, it wasn't important to him, he was just testifying because he couldn't live with himself any more.

Well, let's take a look at that. Mr.Umbogy went ahead and had a photocopy of a Value Line article. It is another stick. What does that prove? The fact that he has a copy of a Value Line article does not prove that Rodman killed the bear; does not prove that Umbogy had those conversations with Rodman. He showed you the stick. That is all he did.

And you know what is irteresting about it, was that this man was able to remember the times, places of his meetings with Rodman pretty accurately, around the 27th of the month of September, but when I asked him when he met with the U. S. Attorney's office, he couldn't remember. When I asked him when he made his deal with the U.S. Attorney's office, he couldn't remember. Mr. Lowe had to help with the deal, that it was in the fall of '72.

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Then he said "That's right, some time after October 12th." But he couldn't remember that. It is amazing the things he couldn't remember. But he sure remembered speaking to Rodman.

Back in 1973, an agent of the United States Government went to Mr. Umbogy's home in Flushing. Now, the purpose of him going there was to look at certain files that contained records of Mr. Umbogy with regard to certain stock deals. This agent looked through this file and Mr.Umbogy was there, and this was a time when Power Conversio was under investigation.

Number 1, Mr.Umbogy would have you believe that he turned over that file to that United States Government agent without looking into it to see what was there. And, I say to you, ladies and gentlemen of the jury, that is incredible. He knew what was in that file. That is why the United States Government sent an agent over to look at the file, because Umbogy told him the type of materia that was in it. That agent looked through the file. Umbogy was with him. That agent didn't pull out this photo-copy of the Value Line brochure. He didn't discuss the Value Line brochure with Umbogy because it wasn't there. It was never in that file.

He went ahead and he got himself a stick so that

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he can prove that Rodman killed the bear.

His testimony about not knowing the article was in that file until February 20th is incredible. It reminds me of a case, a negligence case where the defense attorney takes the position that the plaintiff, the complainant was accident-prone, that there was nothing negligently done by the defendant, that this plaintiff just keeps having accidents and suing. And this defense counsel just couldn't break down that complainant on the witness stand. He just couldn't shake him. In no way could he shake him. He finally walked away in chagrin, disappointed, because in his heart he knew that that witness was lying, but he couldn't prove he was accident-prone. And with that, the witness got up, crossed his feet and fell flat on his face.

That is what happened with Mr. Umbogy, he got up, crossed his feet and fell flat on his face. Because if that document was in that file, it would have been found.

Let's go beyond that. Why did Umbogy wait until February 20th to tell Mr. Lowe about this document, this stick? Number 1, the indictment was out. He could have read about it.

Number 2, he hasn't spoken to Mr. Lowe, according to his testimony, in almost two years prior to February

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20th.

What caused Umbogy to go over to Mr. Lowe and tell him about this document in his file? He didn't even remember the last time he looked at that file.

I submit to you, ladies and gentlemen of the jury, that Umbogy was looking to limit his liability.

Now what is so important, really, about Mr. Umbogy? Mr. Aiken testified that the article of September 29, 1972, which was a Friday, is mailed out on Tuesday. Therefore, if we were to believe the testimony of Mr. Umbogy, the article was out on the street anyway. And what kind of prior notice was Mr. Rodman giving to Mr. Umbogy? An hour, a half hour? What is all that to do about Mr. Umbogy?

Well, Mr. Umbogy says Rodman wanted me to move the stock before the article came out, he wanted to bommerang the stock before the article came out. That is what he said. Is that a half hour before the article came out he wanted him to bommerang the stock, or the night before?

The point is that Umbogy didn't buy any stock. The point is, the article was already out, and the point is, if Mr.Zammas was with Mr. Rodman as Mr. Umbogy said, and if Mr.Zammas had six copies of the article, as Mr.

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Aiken said, and if this meeting was at 8:30 in the morning, as Mr. Umbogy said, Number 1, when was the photocopy made, and Number 2, why would Rodman say I only have one copy, but don't worry I can get others, and Number 3, why wasn't the original copy given to Mr. Umbogy.

The reason is that it never happened that way. It never happened.

Now, what gets me about Mr. Umbogy is that he lied to you. Not that he had reason to lie to you, but that he did lie to you. That is the important thing. The fact that he is under indictment or might be under indictment or might be threatened with a crime, that isn't important. The important thing is that Umbogy lied.

Where did he lie? Let me point out areas in which he lied.

I said to him, "Is it important to you that you get a recommendation from the Government?"

He said no, he didn't need a recommendation from the Government for the sentencing Judge. That was unimportant to him.

I submit to you, ladies and gentlemen of the jury, that was a lie.

When I said to him was making a deal connected with your not wanting to go to prison, he said no. He

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lied to you. On the witness stand, he took an oath and he lied to you. That is why you shouldn't believe Mr. Umbogy.

And what was his motivation in lying? Why would he lie? Number 1, he wanted to cooperate. He believed that this type of testimony would help him. So some time in February, when things started getting hot on the other stocks he was involved with and it looked like the boom was going to come down on his head, after almost three years going back and forth, and the Government leaving him around, new investigations, he figured I better put together something and what he put together on February 20th, was the story about this article.

You know that he lied when he said that going to prison was not one of the things he was worrying about when he made a deal. You know that he was concerned about a recommendationfrom the U.S. Attorney's office to his sentencing Judge.

Now, why did he lie? Because he wanted to mislead you. He wanted to seem more credible to you, and in order to seem more credible to you he figured I will tell a lie. So, I am not telling you to disbelieve this man because he made a deal. I am telling you to disbelieve this man because he has already lied to you and you know he has lied to you. You know those answers were not true.

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How can you believe him beyond a reasonable doubt? How can you convict Bill Rodman on the testimony of Umbogy? You can't. The Government must prove beyond a reasonable doubt with credible evidence, evidence that you can believe, evidence that you would rely upon in the most important decision in your life, that Rodman is guilty. They have got that burden.

Are you going to rely on Umbogy, Constantinou, Wymbs?

Now, Mr. Orenstein. You can't give any credibility to Mr. Orenstein's testimony, because you would have to be guessing. You would have to be guessing because Mr. Orenstein said, "I don't know who told me that the article was coming out. Zammas, Rodman, maybe both. I don't know."

Ladies and gentlemen of the jury, if Orenstein didn't know, how could you possibly know from his testimony. I tellyouthat Mr. Orenstein's testimony had no value whatsoever because he didn't know.

We have gone through all of the Government witnesses that testified against Bill Rodman. Now, I don't deny that Bill Rodman traded Power Conversion stock. That was his job. And, if he had 100 trades or 200 trades or a thousand trades, that is his business. He traded the

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stock and each traded lots of other stocks. That doesn't mean that Bill Rodman was involved in a payoff to Aiken. It simply means thath e traded the stock.

Let's get back to using these rats called by Mr. Lowe. If you were to believe the testimony of those rats, then Mr. Rodman went ahead and kept himself in the kitchen as the chef when it came to Mr. Aiken, and he kept himself in the kitchen as the chef when it came to Mr. Perlmutter, but with regard to every rat on Wall Street, he put out a mailing and he told them, hey, no matter what anybody else tells you, no matter what Aiken says, Perlmutter says, I did it, BabeR uth, I did it, I paid off Value Line.

If the man was smart enough to stay in the kitchen with Aiken, who couldn't talk on it, and Perlmutter who couldn't talk on it, why in the world would he go to those sewer rats and give them a publication, take an ad in the newspaper, "I did it." I tell you, it's ridiculous.

One more thing. The Government says it has to prove its case with crooks.

You heard Mr. Lindsay testify. Mr. Lindsay testified Rodman was a customer's man, he had customers.

You heard Mr. Shaeffer testify. He testified that the SEC had the books and the records of C.I. Oren for years. They knew every customer Rodman had.

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And, did you see those customers paraded before you? Did you see the Government bring down those customers and have them testify, that I bought 100 shares of stock because Bill Rodman told me an article is coming out in Value Line? No. They didn't bring down one customer to testify that Rodman sold them stock by telling them that an article was coming out.

Any of you that ever bought stock know that your stock broker tells you I believe this is going to happen, I believe there is going to be a writeup here, and I hear they found oil, or found gold or might find copper. You have heard it all because that is how stock brokers sell. They sell on the rumor. They give you a rumor. They have faith in it, they believe in it, but they pass you the rumor because as people that buy stock, you don't want to get in when everybody is getting out. You want to get in on the ground floor and if Rodman was the Babe Ruth of Wall Street, he would be letting his customers know that something is going to come out in Value Line, because a broker is no better than the success he gives to his customers, and if you wipe out your customers, you are out of business.

If he went ahead and would have recommended buy Power Conversion, because an article is coming out, because your brokers have done this, but the Government

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didn't produce one such witness.

The defense produced a witness, Arthur Levine. I think he was one of the few witnesses who was not here to prove records, and who was not here as a Government agent, who was not convicted of a crime, was not subject to a potential indictment in the future, was not testifying under an agreement with the Government, who bought Power Conversion stock, and who testified Rodman didn't tell me about this article in Value Line.

Now, that was just one customer. I brought that customer in to show you that they exist.

Mr. Shaeffer got on the stand and testified that he had the books and records. Mr. Lindsay testified there were such customers. I ask you, where were they, why did the Government have to rely on sewer rats? Because it was only sewer rats that would make up the story to get themselves off the hook.

Ladies and gentlemen of the jury, we have gone through all of the witnesses. I have shown you the bias, the prejudice, the motivation of each Government witness to lie about Bill Rodman.

I submit to you that not one witness can be relied upon beyond a reasonable doubt, that their stories not only conflicted with the truth but conflicted with

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each others stories, and there is only one possible verdict you can bring in, and that verdict is one based upon the facts, nt one based on innuendo and not one based upon inference, and not one based upon where there is smoke there is fire.

Juries don't bring in verdicts based upon those types of inferences and innuendoes and cliches. They are brought in on fact, and I beg of you ladies and gentlemen of thej ury, examine the facts, examine them individually, as to Mr. Rodman, and I am sure that when you have done doing that, you will bring in a verdict of not guilty.

Thank you.

THE COURT: Thank you, Mr. Berger.

At this time we will take a five-minute recess. The jury is excused.

(Jury left the courtroom.)

(Recess.)

(In open court; jury present.)

THE COURT: Mr. Entin.

MR.E NTIN: Thank you, your Honor.

May it please the Court, Mr. Lowe, Mr.Shaeffer, Mr.Berger, ladies and gentlemen of the jury:

After Mr. Berger, let me take this opportunity to thank you for your kind attention first during the

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portion of the trial in which we heard and received evidence with regard to the crimes allegedly committed by the defendants, and secondly, for your very kind attention during this very long afternoon, and very long summations by lawyers in this case.

If there is anything that I may have done or did during the course of the trial which served in any manner to offen any one of you, I would askyou not to hold this against my client, as it certainly was not his sin.

Ladies and gentlemen of the jury,d o you know what today is? Today is probably the most important day in the life of Thomas Zammas. It is his only day in court. Your deliberations which you will begin after the charge of the Court -- and when you sit down to start determining the evidence as to whether or not this evidence proves a crime against Thomas Zammas -- constitutes his one bite at the American justice, and I ask you to continue to give the kind of attention you gave during the course of this case to your deliberations with regard to the guilt or innocence of my client.

Ladies and gentlemen of the jury, this case is not a laughing matter. It is not funny, nor do I intend to talk azbout it.

Casseroles, kitchens, baseball players, big

hpb-18

sticks, bears, or anything of that nature.

This is a very serious matter, and I will address you solely on the evidence, and I will discuss with you solely the issues in the case which will have a determination as to whether or not my client is innocent or guilty of the charges against him.

The one analogy that I will refer to, and I will do so early, because make no mistake about it, it is a significant analogy.

End 2B

Mr. Lowe told you in his opening statement that this case and the evidence in this case is like a jigsaw puzzle, with many different pieces that go into many different places which will allegedly somewhere along the line be something for you to look at and make a determination. Mr. Lowe has suggested he has completed his jigsaw puzzle, and I would suggest to you, ladies and gentlemen, that if he did so, there are several pieces missing, and when you examine with me during the course of the next 45 minutes to an hour the pieces that are missing, you will find my client not guilty of every single count in the indictment against him.

There are two real issues for your consideration with regard to this case and as nobody has bothered to explain it to you before, I will do so now.

My client is charged, (1), with six counts of mail fraud. He is charged (2), with violation of the statute 77QB of the FederalSecurities Act.

Although there are 12 counts in the indictment, with 6 in each, if you should find my client not guilty of any one of the six counts relating to mail fraud, you must find him not guilty of all counts relating to mail fraud.

If you find him not guilty of any of the six counts relating to the Security Law, you must find him not

guilty to each and every remaining count.

You are actually looking only for two things, did my client violate the Securities Laws and did he commit a mail fraud.

I would suggest that based upon the evidence presented by the Government in this case that Thomas Zammas is not guilty of any violation of 77QB of the Securities laws. Her Honor, Judge Motley, will instruct you tomorrow, and will read you the statute under which my client is charged, and I may read it to you a little later.

This statute will indicate that the kind of payment that was made allegedly by my client to Mr. Aiken was foreseen under this statute, and this statute said that there would be no violation of Federal law if my client did make such a payment and the fact of the payment was made known by a disclosure in the article.

So all of the discussions and all of the verbiage of Mr. Lowe in this case, and all of the shouting of the word "bribe" has no significance.

My client is not on trial in this courtroom this week for bribery. Her Honor will instruct you tomorrow that my client is not on trial for bribery, my client is on trial for making a payment which he had a perfect right to make under the Federal law provided said

payment was disclosed.

MR.LOWE: Your Honor, I object to legal argument by counsel, particularly in light of your Honor's determination earlier today on that subject.

THE COURT: Yes, we went over that earlier and it was determined that under State law if the jury finds it to be true, it is not a legal act. The question is whether or not you are implying to the jury that giving a payment under the circumstances here is legal.

You said it was legal and we determined it was illegal under State law to give such a payment. The Federal law makes it illegal to give such a payment if it is not disclosed. Don't mislead the jury by telling them it is a legal act if they find it did occur.

MR. ENTIN: I think I indicated it was legal under Federal law, your Honor.

THE COURT: No, we had a discussion earlier which said that that statement should not be made to the jury, which you have made.

MR. ENTIN: Ladies and gentlemen, you may not approve of the fact that Mr.Zammas made a payment to Mr. Aiken, but you took an oath to do your duty as jurors and follow the law as the Court instructs, and if this Court instructs that the mere payment of the money will not give

rise to a violation of Federal law, whether you agree or disagree with the act, you can find my client not guilty.

For the further purpose of this argument, the defendant Zammas will concede the payment of the $15,000 to Eric Aiken. However, he will also concede that he gave Mr. Aiken cash, he gave Mr. Aiken stock, and he gave Mr. Aiken stock options for the purpose of this argument.

The Court will instruct you as indicated previously, that Zammas is charged only with a violation of 77QB as to the last 7 counts, which provides as the Court will instruct you disclosure must be made.

The Government has failed to prove by any evidence whatsoever that Thomas Zammas violated 77QB beyond and to the exclusion of a reasonable doubt. The Government has presented no proof whatsoever that Zammas instigated, desired or caused the non-disclosure of the gratuity in the article.

Recall first the testimony of Stanley Perlmutter. Did you hear Mr. Perlmutter say at any point in his testimony, "Mr.Zammas told me that he wanted to pay for an article and he didn't want the payment disclosed"?

Mr. Perlmutter never said that because Mr.Za mmas never instructed him tosay that.

Did you listen to the testimony of Eric Aiken,

who described at great length first the meeting of September 14 or 15 at La Fortuna restaurant and, secondly, the meeting on September 28th at The Ground FloorCafe? Did you hear Mr. Aiken say one word about Thomas Zammas telling him not to disclose that he had been paid anything for the article?

Mr. Lowe in his closing statement made a very big deal over the fact that cash was paid and if it was cash alone that was being paid, perhaps Mr. Lowe's argument might hold water, but it wasn't cash alone, it was stock optioins which if Mr. Aiken sold the stock people would know about it, if he exercised his stock options, people would know about it.

Stock and stock options are like checks and are easily traceable and raise no inference whatsoever of a secret or furtive agreement. Mr. Zammas never told anyone not to disclose the payment to Mr. Aiken.

What about the fact, and I think it is important to note the dates with regard to disclosure, that Mr.Zammas never even knew, according to the Government witnesses, that an article was going to be published, and if he didn't know an article was going to be published, how would he know whether to advise someone whether or not to disclose an interest?

What do I mean by didn't know the article was going to be published? Recall, first, the testimony of Stanley Perlmutter. Mr. Perlmutter testified to you that Eric Aiken told them at La Fortuna and had told him several times previously, "I cannot guarantee the publication of any article in Selection and Opinion."

Arnold Bernhardt has the ultimate authority. He determines what goes into Selection and Opinion and determines what doesn't go into it."

Recall Mr. Aiken's testimony. He called that an "amiable fiction." He said in fact that he had almost ultimte authority but he said he never told that to Mr.Zammas and then admitted that he told Mr. Zammas on September 14 that he was taking the money and taking the stock to look into the company and the first time Mr.Zammas knew that an article had in fact been published was after it had been published, the day before the issue date, four days after the mailing and before he could even tell Mr. Aiken to disclose if he so desired.

So I think it is pretty clear from the testimony that an inference is raised in the favor of Thomas Zammas that he was not even concerned with the question of disclosure and any act with regard to disclosure taken by Eric Aiken was solely his act and not at the instigation

of Thomas Zammas. Why? Recall also the testimony of Aiken. He was asked specifically, "Do you recall the question, is Wall Street a rumor mongers haven," or something to that effect, and Mr. Aiken testified, "Yes, as a matter of fact stock rises on rumor and comes down on fact."

For Mr.Zammas to net any kind of particular benefit based upon the testimony of Mr. Aiken who was the only Wall Street expert that bothered to explain this to us, the knowledge that an article was coming out would make the stock rise, but nobody ever bothered to tell Mr.Zammas the article was coming out until the night at 11:30 before the issue date of the article, five days after ithad been mailed to subscribers.

So, Number 1, there was no advantage to Mr. Zammas in particular for non-disclosure. The rumor would have been all he needed and he didn't have the opportunity to have a rumor because he didn't know there would be an article published based upnon the Government's evidence until five days after it was already done.

Secondly, if you wish to believe the testimony of the Government witnesses, Mr.Zammas made no secret that an article was coming out. Allegedly, according to the Government witnesses, he told every Tom, Dick and Harry on Wall Street, "Hey, watch for the articles that are

coming," when he didn't know it was on its way, but assuming the testimony is accurate, he told everybody. If he told everybody about the article, he had no desire to hide anything and there was no testimony whatsoever that Mr. Zammas in fact his anything or urged Eric Aiken to hide anything.

Ladies and gentlemen of the jury, let us examine the question of the cash payment a little bit closer, becauee the cash payment is the only thing that Jack Lowe has to argue about with regard to the question of non-disclosure, and he will indicate the cash by its very nature is dirty, it is sneaky and it is used for secret deals, and I would suggest to you, ladies and gentlemen of the jury, if that was the case, every one of us as we bvught a hot dog or hamburger during the last week was engaged in a sneaky deal, because we didn't pay for the hot dogs or hamburgers by cash.

Jack Lowe is going to argue,I am sure, that the fact that the amount was $15,000 paid in cash was significant but, ladies and gentlemen, was there one word of testimony that the cash payment was Mr.Zammas' idea? Not one word. Who wanted the cash payment? Eric Aiken wanted the cash payment. Why didEric Aiken want the cash payment? There are a number of reasons and none of them go to the question of disclosure.

Number 1, Mr. Lowe argued to you that Mr. Zammas had cheated Mr.Aiken in the past and therefore Mr. Aiken wanted a cash payment to guarantee that he would actually get paid. That calls for nothing on Mr. Zammas' part, that just calls for something on Mr. Aiken's part.

Secondly, the question of cash with regard to the income tax that Mr. Aiken talked about. Mr. Aiken testified he filed no tax return in '69, filed no tax return in 1970, filed no tax return in 1971,filed no tax return in 1972.

Mr. Aiken may very well have wanted cash to hid his income from the Government, but not to hid it from anybody else, and that is something Mr. Lowe has to deal with.

Lastly, Mr. Lowe argued there is something sinister about meeting in Italian restaurants and I guess later in men's rooms. I would suggest, Number 1, that if every business meeting ever held at night in an Italian restaurant was by its nature sinister, we have a city full of criminals, and I don't think youcan say because people meet in a restaurant at night they are looking to hide something.

What about the great men's room trick? He said you heard Mrs. Aiken and Mrs. Aiken said they had met in the men's room. If you heard Miss Palumbo's testimony,

she testified that Mrs. Aiken sent a waiter to the rest room and couldn't find Mr. Aiken in the rest room and couldn't find Mr.Zammas in the rest room. Why not? Because they were in the bar. Remember, Mr. Lowe gave great credence to what Miss Palumbo said because of the unusual amount of time Mr.Zammas and Mr. Aiken were in the rest room. If you listen to Aiken, one took an envelope out of his pocket, the other one took out an envelope and they exchanged envelopes and that took no more than 20 seconds and I think a person perhaps as unreasonable as Mrs. Aiken would not be disturbed by a 20-second lapse.

What in fact happened is what Miss Palumbo indicated happend. Mr.Zammas doesn't like to talk business in front of his girl friend. She testified to that on the stand. They went quietly into the bar -- it was 11:30 at night -- only because Mr. Aiken was going to the opera and whatever business they had to transact they transacted in the bar. There is nothing furtive or sinister about meeting in a bar to discuss a business deal after somebody comes back from the opera and no matter how you twist it, you cannot make it appear more sinister. That is why I say the Government doesn't have direct proof with regard to disclosure and no circumstantial proof withr egard to disclosure.

There is no proof to show that Thomas Zammas aided and abetted Eric Aiken in not disclosing the gratuity. The Court will give you instruction with regard to aiding and abetting and will indicate to you that in order to aid and abet you must instigate, procure or cause -- or cause -- the action the other person takes. There is not one word of testimony that Thomas Zammas procured, instigated or caused Eric Aiken to not disclose if in fact, ladies and gentlemen, Eric Aiken didn't disclose, and I will get to that in a moment.

The Government has failed to prove beyond a reasonable doubt that Eric Aiken published the article in question. The Judge will read you the statute tomorrow. The statute will say it is a crime to publish. Was there one bit of testimony that you heard that said thatEric Aiken was the publisher of Value Line Selection and Opinion?

The answer, ladies and gentlemen, to that question is no. Eric Aiken testified he was an editor, he was not a publisher. One can't be an editor and publisher.

Secondly, Arnold Bernhardt was the publisher and he did have the final say. Therefore, the only one who could have possibly published the article was not Eric Aiken, the only one who could have possibly published that article was Arnold Bernhardt, and he is not on trial

here. Eric Aikencould not guarantee the publication and because he could not guarantee the publication,he could not publish it.

Ladies and gentlemen, the last witness who we presented,and the only witness, in the defense case, testified thatA rnold Bernhardt & Company, even if this gratuity had been disclosed, would not have published the fact that an employee had a beneficial interest.

Ladies and gentlemen of the jury, it was read to you by Mr. Lowe, and I will read it to you again, the good faith declaration indicated that only beneficial and stock interests of officers and directors were to be disclosed in Value Line Selection and Opinion, and this just wasn't the policy of Value Line Section and Opinion.

Do you recall Mr. Lowe reading as follows:

"This has been revised fully to comply with the new reporting requirements of the SEC. The complete set of the current comflict rules of the company whicht he SEC study described as one of the strictest and most detailed of any they had seen will be sent to any subscriber upon request."

You will get to read these rules. These rules are approved by a division of the United States Government, the SEC, which said that an editor did not have to disclose,

that an editor was under no obligation., The publisher, its officers and directors were the only ones under that obligation.

The Government has failed to prove beyond a reasonable doubt a violation of Section 77QB, as set forth in Counts 7 through 12 of the indictment.

What constitutes a reasonable doubt in this case? If you believe thatThomas Zammas did not require non-disclosure as indicated in this argument or if you are unsure as whether or not Thomas Zammas required it, I would suggest you have a reasonable doubt and I would urge you to acquit.

If your doubt is based upon a lack of evidence presented by the Government, recognizing that the Government has the burden of proof at all times and not the defendant, then your doubt based upon this lack of evidence would be a reasonable doubt and I would urge you to acquit.

If you believe that as indicated by theproof and the statute in this argument that Eric Aiken was not the publisher of Value Line or if you are unsure as to who was the publisher of Value Line, then I would suggest you have a reasonable doubt, and ifyou have a reasonable doubt, you must acquit.

What about the first six counts, the question of

mail fraud? Initially, Mr. Lowe has alleged there were two separate frauds committed in the mail fraud portion of this case. First he indicated to you that it was a fraud on Arnold Bernhardt & Company because nobody disclosed to Arnold Bernhardt & Company that a gratuity had been paid.

Ladies and gentlemen of the jury, did you hear one witness from Arnold Bernhardt & Company come in here and say that the gratuity or the stock or the stock options were not disclosed? They had every opportunity to present this testimony and didn't.

Ladies and gentlemen, let me read to you from the good faith disclaimer:

"Every officer, director and employee must report every month to the legal department of the company every security transaction that has been made for his own account or for any account he advises in which he has any other beneficial interest. These transactions are reviewed by the company's counsel and its security officers and violations, if any, are reported to the president."

Was there one witness or one iota of proof from Arnold Bernhardt that Eric Aiken did not in fact report pursuant to this policy the facts that were made known in this case? Recall the last witness. To the present day, after the indictment, after Eric Aiken pleaded guilty,

for whatever reason, Value Line still hasn't taken an official position, and I would suggest the reason is that the policies indicated in there were conformed to and if they were not, Mr. Lowe would have had testimony to that effect.

Further, they indicated that there was an ultimate fraud on the purchasers of the Value Line Section and Opinion who thought they were getting an objective, unbiased article and werein fact getting a "paid advertisement," a favorable article.

Number 1, all the public had to rely on, and they were put on notice by it, ladies and gentlemen of the jury, was the good faith disclaimer that Arnold Bernhardt itself published. In that disclaimer all Value Line promised its subscribers was that if an officer or director or one of the funds had a stock interest in excess of $5000, it would be divulged. If an employee had an interest, and Eric Aiken was an employee -- if an employee had an interest, it would be reported to the company's legal counsel and any conflict would be resolved by the internal mechanism of the company and that was all the public had a right to rely on.

What about the question of favorable article? Do you recall Mr. Lowe putting Mr. Aiken on the stand and

showing him the article on Power Conversion and saying to Mr. Aiken, "Now, was this a favorable article?" Inference: Being bought and paid for, he would say something different than in other articles and true about the company, and Mr. Aiken read you this opinion as to how favorable the article was, "clearly this is not a situation for conservative or income-minded investors. But venture some accounts who are seeking superior appreciation potential over the intermediate to longer pull and able to incur the substantial risks involved in emergent advanced technology issues could find Power Conversion shares a rewarding commitment.

In other words what Mr. Aiken wrote in this advertisement was "This is a very dangerous stock, highly volatile, speculative and if you are looking for investment income, I suggest you stay away from it."

Maybe that is more than what the company merited, and I put into evidence the report of Walter, Yeckes & Gallant, which Mr. Aiken admitted he plagiarized.

What did Walter, Yeckes say, and nobody suggests this is a bought-and-paid for article? It is in evidence and you will be able to read it.

"Based on the above," -- referring to Power Conversion, "We recommend the shares of Power Conversion

for speculative investors willing to accept the above average risk inherent in a small technological company during its early phases of the anticipated growth cycle."

This doesn't sound more favorable or less favorable than this article and I suggest you read them both to determine if there is anything in this article on its face patently untrue.

What about D. H. Blair, a member firm of the New York StockExchange? They did an article too. What did they have to say any different from Selection and Opinion? The answer is nothing. Here is what they say: "Based on earnings prospects for this year of 75 cents to 90 cents per share, followed by a possible surge to $2.50 to $3.00 per share level for 1973, we believe that the shares of Power Conversion could be very rewarding for accounts willing to accept the risks inherent in new companies in new technologies during early growth phases."

Nothing different in that Value Line article from the other article. There was nothing untrue in the Value Line article and it was no more favorable than any other article being published about the company at that time which according to Mr. Perlmutter, was a hot issue and I would suggest, ladies and gentlemen of the jury, that you read these three articles before you determine any question

as to whether or not these articles were favorable.

In his opening statement Jack Lowe compared Value Line Seleciton and Opinion to Consumer Reports and I would suggest this is another unfortunate analogy because Consumer Reports is not in the business of stockpiling merchandise and selling it out to consumers, whereas Arnold Bernhardt admits that it is in the securities business, buys and sells securities, it has an interest in securities and it is a completely different situation.

So don't be fooled by the illusion to consumer reports.

What constitutes a reasonable doubt with regard to Thomas Zammas' liablity for mail fraud? If you believe that the Government failed to disclose that Eric Aiken didn't disclose toArnold Bernhardt a gratuity had been paid him, that constitutes a reasonable doubt and I would urge you to acquit.

If you are unsure of whether Eric Aiken disclosed this to Arnold Bernhardt,t hat constitutes a reasonable doubt and I would urge you to acquit.

If you believe that the Government failed to prove that the public had a right to rely on the fact that an employee interest would be disclosed, then you have a reasonable doubt and I would urge that you acquit.

If you are unsure of the right of the public to rely based upon the Arnold Bernhardt good faith disclaimer, then you have a reasonable doubt, and I would urge you to acquit.

Further, if the article that was published is not untrue and is in fact a truthful article, I would suggest that the entire question as to any ultimate fraud upon the purchasers of Selection and Opinion raises a reasonable doubt and I would urge you to acquit.

Now, although Mr. Berger spent a great deal of time examining the Government witnesses, I think it incumbent to examine all of the Government witnesses, including those that testified in particular with regard to Mr. Zammas, and at this point I would indicate to you that the Government's witnesses against Thomas Zammas are unworthy of belief, you should give no credence to their testimony and you should acquit Thomas Zammas if you feel the Government witnesses were not worthy of your belief.

Initially, I would suggest that what we were presented with was a parade of pathetic professional perjurers. Let's look at them. Top to bottom. First we put on the stand to testify against Thomas Zammas Stanley Perlmutter. Mr. Lowe called STanley Perlmutter a minor figure. That was the agreement. In the agreement

this minor figure admitted to several deals he had and then this minor figure, who had absolutely no bearing on anything, said," Let somebody else pick five more deals and Iw ill confess to those too."

Here is a man that was involved in so much that he couldn't even remember what he was involved in.

You recall Mr.Berger talking about putting up the shield. Well, the first one to raise the shield in this case was Stanley Perlmutter. I asked him about stealing $100,000 from his customers' accounts, and his response was "I respectfully decline to answer that question."

I asked him about manipulation of the stock of Autotrain and he respectfully declined to answer that question. I asked about paying for an article with regard to Building & Land Technology, and he respectfully declined to answer that question on the ground it might tend to incriminate him.

I asked about Newport Chemical, about Basic Leasing, Basic Foods, and on each and every one I asked him, other than the particular story he was in here to tell this week, he took the Fifth Amendment.

I would suggest that he is not worthy of your belief. Gobeyo nd that, go to the essence of his testimony. He started out by tellingyo u that Thomas Zammas

cxontacted him in June or July and Mr. Lowe makes light of that, that is unimportant, that is a mere technical variance with what the other person said, and I suggested in my cross-examination and I suggest to youhere that the testimony is that Mr.Perlmutter was Mr. Aiken's bag man and Mr. Aiken has no recollection whatsoever that his bag man called him with a big deal in April, May or June, and I would suggest that was a lie that Tom Zammas approached Stanley Perlmutter in April, May or June on Power Conversion because it doesn't square with the testimony of any other witness we have heard, and I suggest Stanley Perlmutter lied on that, he lied on other things and you shouldn't convict Tom Zammas if you do not have absolute faith in the testimony you heard from the witness stand.

What about Eric Aiken? Mr. Lowe has gone to great lengths to tell youf rom the start that he is going to present crooks, but there is a word he absolutely avoided. Not onlyd id he present crooks, he presented perjurers.

What did Mr. Aiken tell you? He said, "Yes, I had a deal with Mr. Lowe back in 1973 and all I had to do was tell Mr. Lowe the truth and Ic ald plead guilty to one count of fraud. So one month later after Imade this deal withM r. Lowe, Iwent to Philadelphia and I committed perjury before the SEC."

"Q How many times did you commit perjury?

"A I couldn't possibly count them. I committed perjury in front of theSEC in Philadelphia."

Do you remember my asking him if he raised his hand and took the same oath in Philadelphia he was taking in this court? He said yes.

I asked him if he swore to tell the truth in Philadelphia, and he said yes. I asked him if he testified looking everyone inthe eye in Philadelphia, as he did here, and he said yes.

I would suggest if he could lie in Philadelphia, he lied right here in New York and if the man is a perjurer, out to save his own skin, out to curry favor with the Government, irrespective of who he drags down with him, he is not worthy of your belief.

Her Honor will instruct you as to the weight togive the testimony of an admitted perjurer. Listen carefully and follow that instruction.

What about Mrs. Aiken? She testified next. She is really not muchbetter than Mr. Aiken, despite how Mr. Lowe might gloss over that. Recall my question to her, "Have youever committed perjury to help your husband?"

At first she said she wasn't sure what I was talking about and then came back and said, "Oh, yes, you

mean the false affidavit I signed?"

I asked her if it was under oath and she said yes. And I said," And you lied," and she said yes, I lied.

I asked her, "Would you lie from this stand to help your husband because you love your husband," and her response was "Yes, I would."

Anyone that would admit they would lie from that stand to help their husband whose cooperation is being made known in carrying down an innocent man, I would suggest is not worthyof belief, is not worthy of credence and, again, listen to the Court's instructions with regard to the testimony of admitted perjurers.

I reallyfeel that Mr.Berger covered Perry Constantinou fairly well. The only thing I would point out with regard to the testimony of Constantinou, and Umbogy and Wymbs, is if you choose to believe Aiken and Perlmutter, you must absolutely disregard the testimony of the other three because the testimony is absolutely mutually exclusive.

In the alternative, if you believe Umbogy was telling the truth, Wymbs as telling the truth, and if you believe Constantinou was telling the truth,you must disregard the testimony of Aiken and Perlmutter.

Why? Let's start with Umbogy. He did not testify he received the article from Bill Rodman and Tom

Zammas the date of the publication, which was the 29th. Recall the testimony. He had used consistently throughout his testimony the date of the 27th. I had asked him how he pinpointed the date of the 27th and his comment was the day before the article came out, and that was where his recollection was. He got it the day before the official publication date. When I showed him that the official publication date was September 29th -- and your recollection controls -- I believe you will recall he said he got it at 8:30 in the morning onSeptember 28th. If you believe Mr. Aiken, Mr.Zammas didn't get the article until 11:30 that night. So it was patently and absolutely impossible for Mr.Zammas or Mr. Rodman to give Mr.U mbogy an article 16 hours before they got it.

I suggest the testimony of Umbogy constitutes a fantastic fudging of the truth.

What about Bob Wymbs? Again an admitted perjurer. He admitted committing perjury in this case and his testimony was in total disagreement with everyone else's.

Mr. Berger covered the testimony of Wymbs at some length.

I think Perry Constantino remember very little and Mr. Orenstein remembered even less.

Ladies and gentlemen of the jury, your verdict in this case can either encourage or discourage the Government from presenting cases and trying people with regard to testimony such as this.

Do you subscribe to the Government's position that you must make deals with perjurers in order to catch crooks? I do not subscribe to the theory that the United States of America must put confessed perjurers on the stand and then throw their testimony into the laps of the jury and say,"I know they confessed to lying under oath, but if the storys ounds similer enough maybe there is something there upon which you can convict." Because that is what they have done in this case. They have put confessed perjurers on the stand. Mr. Lowe has admitted that these peoplehave lied time and time again. With all the times these people have lied, they are professionals at lying. If their testimony meshes somewhat close, perhaps you might believe what they say, but I would sugggest that this is stretching what a jury must do too far,b ecause the minute you have to start picking at what may have been true and what may have beenf alse, knowing at all times that the man admitted to lying under oath, is a burden which no jury should really have.

The testimony by itself is highly suspect. Here are individuals whose sole purpose for being in this courtroom is to limit their own liability. That means cover themselves as best they can. That means that everyone that you heard, Mr. Aiken, who has pled guilty to one count and has not yet been sentenced, Mr. Perlmutter, who has not even pled guilty, Mr. Umbogy, who has pled guilty or will in the future and has not been sentenced, Mr. Constantinou, who has pled guilty but not yet sentenced, every one of these men is facing jail, every one of these men admits -- admits -- that their testimony will help them with regard to their future status. What could put more suspicion on that kind of testimony? What could make people want to lie any more than staying out of jail themselves? They don't care who they take down with them, don't care if they have to lie about another person, don't care if they have to invent details to make someone's case look better, but give them what they want to hear "and save my own neck."

That is not the kind of testimony you should have to find upon. Was there one nonperjuring, noncrooked witness that could tie Tom Zammas to any illegal act? The answer is no. The closest they

came to a nonconfessed perjurer was Leonard Flocco of City National Bank. And do you recall his testimony?

When he testified in 1972 in front of the SEC and he was worried about his own criminal liability he testified one way. When he testified the next year in a civil action dealing with the money of the bank and trying to protect his job he testified a second way. When he was in this courtroom this week testifying to do damage to my client he testified a third way.

Have you ever seen a bank president with such a hideous memory? I am glad I have a friend at Chase Manhattan because if Mr. Flocco was my banker my money wouldn't be safe. He can't remember if he was instructed to write memorandums or not. He can't remember days he talks to people and days he doesn't. And that was the best witness that the government presented, that was their star. He was the only one that wasn't a confessed perjurer or crook before he got on the stand. Can you convict Tom Zammas on such testimony?

Ladies and gentlemen, if you convict Tom Zammas you encourage the United States Government to go crawling into sewers to look for more rats, you

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encourage the government of the United States to plea bargain with perjurers and felons in order to catch accomplices and you make a big game out of justice, you make it a game where one person points his finger at another, and before you know it everybody is pointing his finger at everybody else because you have no check or control.

When everybody is up there lying, it is very hard to find the truth. There is a saying about practice in courts of law: We who labor here seek only truth. That is what we seek, the truth. We want to know what the truth is.

Ladies and gentlemen, who can we find the truth when the government of the United States puts on witnesses whose greatest ability is the ability to lie, to lie with a straight face and to lie to protect themselves? I suggest you cannot find truth.

It is the solemn duty of this jury to follow the court's instructions and hold the government to its burden of proof. There are very few things proven in this case and I disagree with Mr. Lowe that certain things are conceded. Mr. Zammas may have met with Mr. Aiken, but we don't know the details of that meeting, we don't know that Mr. Zammas didn't in fact

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have anything to do with the question of nondisclosure. We know the government has not presented any evidence from Mr. Aiken or from Mr. Perlmutter with regard to that question. Why? Because it didn't matter to Zammas on the record whether it was disclosed or not. The government has not proved a thing. It is a big hole, nondisclosure.

Aiken's not a publisher. That is a big hole. The article is truthful. That is another big hole. The subscribers had no right to rely on anything other than what they were told to rely upon by the magazine itself. That is another big hole. You don't know whether Aiken did in fact report this to Arnold Bernhardt. That is another big hole. The government case is so full of holes that even its most skilled perjurers could not begin to close them up. The government has utterly failed to prove its case.

I urge you to do your duty. I am confident, Tom Zammas is confident, truth is confident, that you will do your duty well, that you will do the only thing you can do based upon the kind and quality of the testimony you have heard: you will acquit Tom Zammas on his day in court.

Thank you.

THE COURT: Thank you, Mr. Entin.

MR. LOWE: Your Honor, might we have a five-minute recess at this point?

THE COURT: The jury is excused for five minutes.

(The jury left the courtroom.)

MR. ENTIN: Your Honor, at this point I would like to move for a mistrial with regard to the court's statements during my closing. I believe I never said that the activity involved was not a violation of law, I believe I said at all times federal law. I think your Honor's comment with regard to the law, with regard to the fact that it was a violation of state law, is highly prejudicial.

THE COURT: Motion denied.

(Recess.)

(In open court; jury present.)

THE COURT: All right, Mr. Lowe.

MR. LOWE: Thank you, your Honor.

Ladies and gentlemen, I am sure you are tired. I am certainly sure your ears hurt. It is 25 minutes after 5 and I am going to try to be as brief as I possibly can, but I must say this to you, ladies and gentlemen, this case is far too important that I

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should leave anything unsaid simply because I am tired or you are tired or anyone else is tired. This case is far too important to leave anything undone that should be done and for that reason I ask, and to some extent I almost demand, your attention for a short period of time until we are finished, and I thank you for it.

Let me address myself first to some of the arguments raised by the counsel for the defendant Thomas Zammas, since those are possibly more fresh in your mind.

Ladies and gentlemen, Mr. Zammas' counsel stood here and conceded to you, for purposes of his argument, that Mr. Zammas paid the money, eliminating an entire question from the case. He proceeded to attack the witnesses the government presented as liars, after having conceded that what they said must have been true, because wehat they said was that Mr. Zammas paid the money.

The core of the argument for Mr. Zammas is that somehow or other poor Mr. Zammas was not involved in nondisclosure.

Think about this for a minute, ladies and gentlemen: Mr. Zammas wanted that article published. Do you think for one minute he wanted a headline on it that said, "Ladies and gentlemen of the world, take notice

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that this is a brought and paid for advertisement and it is paid for at the rate of $15,000 in cash per ad"? Do you think that would have helped him any, to have had an article that announced that fact? Do you really think Mr. Zammas did want this disclosed?

Let me tell you how you know he didn't want it disclosed. Mr. Zammas did business with Mr. Aiken before, the Casa Bella article; no disclosure in the Casa Bella article. Do you think Mr. Zammas figured that maybe this time there would be disclosure? Do you think, ladies and gentlemen, for one minute that Mr. Zammas wanted disclosure of the fact he had paid a bribe?

MR. ENTIN: Your Honor, objection. The Casa Bella article is not in evidence.

THE COURT: Well, that was part of Mr. Aiken's testimony as to why he didn't want to do business with Zammas, as I recall. He testified he had been involved in the Casa Bella article with him.

MR. ENTIN: The article is not in evidence and there is no evidence before the jury that interest was not disclosed. There is no testimony that there was nondisclosure in Casa Bella.

THE COURT: Well, I don't think there is.

rma8

I don't know that there was any such testimony, as to whether there was a nondisclosure or not. My recollection is that Aiken testified he didn't want to do business with Zammas initially because Zammas didn't pay him as promised on the Casa Bella deal.

MR. ENTIN: My objection goes to Mr. Lowe's statement, which is not in evidence, that there was an article published in which there was no disclosure made.

THE COURT: Is that your statement, Mr. Lowe?

MR. LOWE: That is the statement I made, your Honor, and if I am misstating my recollection of the record, I can only apologize.

MR. ENTIN: I move to strike, your Honor.

THE COURT: I told the jury it is their recollection of the facts which control. The motion to strike is unnecessary.

If they remember it differently, they remember it differently. I don't remember precisely what Mr. Aiken said, but it is the jury's recollection that controls and they might even infer that from all of his other testimony or the testimony relating to this, if they so desire. That was also an illegal proposition.

There is evidence from which they could, if they believed the testimony of Aiken, infer that that was so in that case, so it is unnecessary to strike it.

Proceed.

MR. LOWE: Let's carry it one step further, ladies and gentlemen. Mr. Entin suggests that paying in cash is somehow perfectly okay because we all buy out hot dogs with cash. The last time I looked, although they keep going up every day, the price of hot dogs has not yet reached the $15,000 level.

It is not, ladies and gentlemen, in any of your experiences, normal to pay a routine, legitimate bill of $15,000 in cash. Nor, ladies and gentlemen, is it normal to do it in a men's room. And of course Mr. Zammas didn't want to discuss his business affairs in front of his girlfriend because, ladies and gentlemen, Mr. Zammas' girlfriend got up and testified. And, you know, Mr. Entin forgot, in talking about all the perjurious witnesses, there was no evidence, not even a suggestion, that Stephanie Palumbo told anything but the absolute truth.

Ladies and gentlemen, what they are telling you is that because Mr. Zammas didn't come out and say,

"Don't disclose this," he is not responsible for it not being disclosed. He didn't have to say that. He knew that Aiken wasn't going to disclose it because what would have happened -- and again contrary to what Mr. Zammas' lawyer would have you believe -- the man from Value Line called by Mr. Zammas' lawyer as a witness said that if the company had known about the bribe before the article was published, then the article would not have been published. If they found out about it afterwards, they would have published a warning to their customers.

That is the testimony, ladies and gentlemen, from which, since you have not seen any warning published and since the article was published, you might reasonably infer Mr. Aiken did not run hat in hand to his boss and say, "Hey, Boss, I just got a bribe."

I suggest to you, ladies and gentlemen, another way you can infer that. Mr. Aiken got indicted and charged with a crime for his behavior. You might think that if other people at this company knew about and participated in the same kind of activity they might be here. There is no evidence whatsoever that Aiken told anybody. Every bit of evidence is to the contrary. Aiken well knew he was engaged in criminal

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activity and you don't go about telling people about it. That argument, ladies and gentlemen, is the last gasp of a drowning man.

The evidence against Mr. Zammas is so overwhelming that there is no argument reasonably to be made apart from trying to obfuscate the issues in the case.

You will notice that Mr. Zammas' attorney doesn't like my use of the word "bribe." He chooses the word "gratuity." I suggest a gratuity is what you leave at the end of your dinner for the waiter, 15 or 20 per cent of the bill. $15,000 in cash, ladies and gentlemen, is not a gratuity, it is a bribe. Let us call things what they are.

Mr. Zammas concedes that he paid the money. On that basis, ladies and gentlemen, in connection with the total circumstances in which the money was paid, the way in which it was paid, the places in which the transactions took place, the times at which they took place, you can reasonably find that Mr. Zammas sure as the devil didn't want anybody to know it had been paid for.

Let's get to the really serious argument in the case, and that is should the government's witnesses be believed.

rma12

The argument has been made to you that these people are all very shrewd and very clever and so good at making things up and they are professional perjurers -- you have heard all the words, I don't have to repeat them to you -- but there are two things I would like to point out about that, one of which came out plain as day in the testimony in this case and until this minute no one has seen fit to call it to your attention; the other is more simple.

If those people were so skilful and so shrewd and so lying, why is it that the defendants feel that there are gaps in the government's puzzle? Why, if these people were making up stores, don't they just fill in the gaps, make it all up? What would prevent Mr. Aiken, if he is making up a story, from saying, "Oh, yes, I spoke to Mr. Rodman three or four times about this whole situation and told him various things"? What would prevent him from saying that if he wanted to lie? What would prevent Mr. Perlmutter's having said that if he wanted to lie? What would prevent Mr. Constantinou, instead of saying, "It cost me," from saying perhaps more? What would prevent Mr. Constantinou from saying, "It wasn't just Mr. Rodman at the meeting, Mr. Zammas was there too"? They could

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have made their stories a lot better if they were making them up.

You have been told that these gentlemen and ladies have motives to lie. I suppose, ladies and gentlemen, that that is true, they have motives largely to curry favor with the government to save themselves, and all that kind of thing. There is no doubt about that. It is clear they all have either deals or fears of being prosecuted, or whatever. But there is something that you learned about in this case that should indicate to you that while they may have a motive to fabricate to please the government, they don't have the nerve, because you learned something about the government and about the mentality of these witnesses in this case.

Do you remember that Mr. Aiken had a deal for which he could plead guilty to one count and that would be the end of his problems, provided he cooperated? You know, cooperation, ladies and gentlemen, doesn't mean make up a story, it means to come forward and tell what you know.

Do you remember what he did? He lied to me, he lied to the SEC under oath, and for that reason, of course, you are being told he shouldn't be believed

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now. What happened to him when he did lie? What happened to him? Do you remember? Suddenly, instead of being allowed to plead guilty to one case, one count, he has to plead guilty to four cases, four counts, subjecting himself to the possibility of going to jail for as much as 20 years.

Do you remember what Mr. Aiken said in response to a question, "What did Mr. Lowe tell you would happen if you lied"? Ladies and gentlemen, it was a gross expression, it didn't sound very nice, but he said, "Mr. Lowe told me that he would have my ass," and you can properly find, ladies and gentlemen, that that is just what I told him, and I did.

Ladies and gentlemen, Mr. Aiken paid the penalty for trying to lie. Do you think that these other clever, intelligent gentlemen would like to run the same risks, would get up here and in a vain attempt to please me or please my superiors or please my office take the risk that they will be caught in another lie and thereby lose everything they have struggled to get with me and my office? The deals go out the window if they lie.

Ladies and gentlemen, I suggest to you that contrary to the argument made to you that these

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people have a motive to lie, they have a motive to damn well tell nothing but the truth because the risks of lying are just too great.

Eric Aiken has learned his lesson the hard way.

Perlmutter. Do you know Perlmutter took the Fifth Amendment several times. He probably could have said, "Nope, I never did anything wrong like that," but then if that were not the truth and it were found out he would be in a lot of trouble.

The same is true of Mr. Constantinou. He lied to the SEC, ladies and gentlemen, as he told you. He told you he lied because he didn't want to get in trouble. That is kind of natural, almost. But Mr. Constantinou got caught and indicted and convicted. What's more, he is going to be indicted again and convicted again.

So, ladies and gentlemen, Mr. Constantinou, you might find, has learned something, namely, that lying about things when he is involved with the government doesn't work. So maybe, ladies and gentlemen, he won't try it any more.

How about Mr. Wymbs? I want to say two things to you about Mr. Wymbs. There are a lot of

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arguments, Mr. Wymbs' testimony is confusing, difficult, a lot of things, but he took a big risk for a liar to take, a big risk. Mr. Wymbs testified, ladies and gentlemen, that somebody else was there, Darnice Gennaro; remember? That is Mr. Rodman's girlfriend.

Mr. Berger asked you how do you prove a negative. Mr. Berger and Mr. Rodman, as her Honor will instruct you, have absolutely no burden of proving anything in this case. That is one of the few things said by defense counsel that I agree with: they don't have to prove anything. But when they ask you to believe something, wouldn't it be nice if they gave you some evidence on which to base that belief?

You see, Mr. Berger could stand here and say --

MR. BERGER: Your Honor, at this point I must object. The reason being, of course, the bufden of proof.

THE COURT: Overruled.

MR. LOWE: Mr. Berger can say until the cows come home Mr. Wymbs lied, Mr. Wymbs lied. That is not one shred of evidence that Mr. Wymbs lied.

Wouldn't you feel more comfortable in accepting the argument that Mr. Wymbs lied if Mr. Rodman's

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girlfriend came in here and said, "No, I was never in the apartment when money changed hands, I never participated in any of these conversations," or something like that?

Let me tell you something, ladies and gentlemen. Remember when Miss Palumbo got on the stand and how sweet she was and everything else? Remember one thing, the government had to apply to the court for a grant of immunity, immunity from having that testimony used against her, in order to get her to testify. There are times, ladies and gentlemen, when the generosity of the government runs out. The government has proved what happened at a particular point in time through one witness and sometimes to call more than that costs too much.

In any event, ladies and gentlemen, Miss Gennaro was not here and she is not the government's girlfriend.

I suggest to you that there was another place when Mr. Aiken took a big chance if he was lying, and that was the night he went up to the apartment and he said Henry Goldfarb was there. Remember what he said Mr. Zammas told him about Mr. Goldfarb? Mr. Goldfarb was a broker. Mr. Goldfarb, according to Mr.

rma18

Zammas, was doing a job on Power Conversion. What do you suppose that means? Do you think that if Mr. Goldfarb wasn't their man he would be here and saying that it never happened that way? That didn't happen either.

You see, there were opportunities to prove a negative in this case. They don't have to be taken, but you don't have to take an argument that doesn't have any evidence to back ti up. That, ladies and Gentlemen, is very, very important.

When you listen to an argument -- and I include my own -- if there isn't any evidence, if there isn't any testimony, if there isn't any document or something to base that argument on other than the bold and bald statement of a lawyer, don't buy it, ladies and gentlemen, because we were not there, we don't know what happened and it is not for us to give evidence, it is for us to argue from the evidence what should be found in this case.

I also want to point out to you a little bit about the fact that when you take each witness individually and you carve him up, cut him up into little pieces, rip him to shreds, and then say, "I don't believe this man because look what a liar he is," that is one thing. But when you begin to add them all

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up, when you begin to say, "Mr. Perlmutter said this, Mr. Aiken said this," and although there are discrepancies in their testimony, which you might find, ladies and gentlemen, at a time nearly three years later are normal, they basically support each other as to the essential facts.

There is an old song -- actually it is not all that old, but it comes from a musical and I guess it was a movie and then a play, or maybe the other way around, and it is called Gigi, very popular, and in that musical a very famous and beloved entertain, Maurice Chevalier, who is no longer with us, performed a song and he sang it, I think, to an actress by the name of Hermione Gingold, and it is supposed to be, I guess, a woman with whom he had been in love when he was young, and the lines of the song go something to the effect -- they are reminiscing about the days when they were young and in love and Maurice Chevalier sings, "We met at 8," and Hermione Gingold says, "We met at 9." Maurice Chevalier sings, "I was on time," Hermione Gingold sings, "You were late." Later on in the song Maurice Chevalier sings, "You were all in gold," and she says, "I wore a gown of blue." Throughout it there is a refrain, "Ah, yes, I remember

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it well."

Well, ladies and gentlemen, they don't remember it well in the sense of remembering the exact details, but they do remember that they did meet, they do remember that they did love, and they do remember it as a great moment in their lives, and that is what is important, just as in this case: while these people may not remember whether it was September 27th or September 29th, or can't remember if it was August or September, they remember what happened, they remember the substance and the essence and the important things, and what they testified to, and that is what counts. And, ah, yes, ladies and gentlemen, they do remember it well.

In closing I would like to say one more thing. Mr. Entin has suggested to you that if you bring back a conviction in this case you will somehow be wrongly encouraging the government to continue to go into the sewer. Ladies and gentlemen, it is the job of the government to go into the sewers. It is necessary that somebody go into the sewers, because, ladies and gentlemen, if no one goes into the sewers and tries to clean them out, some day we may all drown in those sewers.

I leave the case in your hands because ladies and gentlemen are the United States of America and it is to you that this case is brought, to you it is given for decision. I ask one thing, that you base your decision in this case on the evidence that has been presented to you, on your fair, intelligent, rational analysis of that evidence, and I am confident that when you have done that you will be satisfied way beyond any reasonable doubt that both Mr. Zammas and Mr. Rodman are guilty of corruptly and fraudulently causing to be published an article about a stock which they were promoting without telling the very people they were delivering the article to that they had bought and paid for with a $15,000 bribe.

Thank you.

THE COURT: Thank you, Mr. Lowe. At this time we will recess until 10 o'clock tomorrow morning. As I told you earlier, ladies and gentlemen, at that time the court will charge you as to the law applicable to this case and then you will retire to the jury room to deliberate tomorrow. You are excused until 10 o'clock tomorrow morning.

(The jury left the courtroom.)

MR. BERGER: Your Honor, may it please

the court, at this time I move for a mistrial on behalf of the defendant Rodman with respect to the remarks made in closing argument by Mr. Lowe, with bringing in Darnice Gennaro as a witness.

MR. ENTIN: I join in that motion, your Honor.

MR. BERGER: I would like to say at this time that I have reason to believe that had the testimony of Mr. Wymbs with regard to Darnice Gennaro anticipated by the government, then we are entitled to certain Brady material with regard to -- I am sorry; if the testimony of Mr. Wymbs had been anticipated by the government, then we would have been entitled to certain Brady material with regard to Miss Gennaro, as I have been advised that Miss Gennaro has on at least a numbrr of occasions met with Mr. Lowe and on those occasions advised him she was not in the apartment in July, August and September of 1972. For that reason I feel the defendant Rodman is entitled to a mistrial.

MR. LOWE: I would like to respond on the Brady material point, your Honor.

Miss Gennaro, your Honor, is represented by Morton Berger. Miss Gennaro was much more avail-

able to Morton Berger than to the government. The government has no obligation to disclose anything to the defense when the government has all kinds of knowledge that the defense already knows it. Therefore, there is no question of Brady. Brady involved suppression of evidence, your Honor.

Mr. Berger neglected to tell your Honor that Miss Gennaro is his client and that that is why he has reason to believe she spoke to the United States attorney and he knows exactly what she would have to say and he could have put her on the stand to say it.

THE COURT: Mr. Berger, I didn't get your point about Miss Gennaro. You say she has spoken to the government and what?

MR. BERGER: She has spoken to the government on numerous occasions, is what she tells me. I did not represent her with regard to anything she told the government on Power Conversion. I am representing her in a civil matter at the present time, and also I did not go down with her before the grand jury when she testified because of my representation of Mr. Rodman.

Miss Gennaro has advised me that (1) she did discuss this case with Mr. Lowe, (2) that she told Mr. Lowe that she was not present in the apartment in the months

of July, August and September of 1972. I believe that the testimony of Mr. Wymbs was unanticipated by Mr. Lowe. I don't think he expected Mr. Wymbs to testify as to the meetings with Miss Gennaro in the apartment.

THE COURT: You didn't expect Mr. Wymbs to testify as to what?

MR. BERGER: The meetings in the apartment in September with Miss Gennaro.

MR. LOWE: I anticipated it and I heard it and that is the reason I spoke to Miss Gennaro.

MR. BERGER: I should have been given the Brady material, your Honor.

THE COURT: Brady material relates to something which the government has suppressed, as the government points out, and that the defendant is unaware of. It can't relate to something the defendant knows.

MR. ENTIN: Your Honor, this alleged meeting with Mr. Wymbs, Mr. Rodman was allegedly there, Miss Gennaro was allegedly there and Mr. Zammas was allegedly there. I don't know Miss Gennaro, I don't represent her, I had never heard of her prior to Mr. Wymbs testimony and I have not been advised as to any Brady material on that, and I would suggest that certainly I am put on no constructive notice whatsoever because

Morton Berger may represent her, and this is the first that this has been called to my attention with regard to Mr. Berger's argument. I had no knowledge of this and I suggest I have been denied Brady material and on that basis move for a mistrial as to Mr. Zammas.

MR. LOWE: Your Honor, I submit when information is available to the defense. as it was, it can well be assumed by the government that it is shared. I think in light of Mr. Entin's closing argument, in which he conceded the essential elements of the testimony of Aiken and Wymbs, and added that there was no evidence of a desire not to disclose, the material would not have been helpful to him because his argument is that while Mr. Zammas paid the money. he shouldn't be convicted for another reason.

THE COURT: Mr. Entin, at the beginning of the trial I had not recollected that you were out-of-state counsel and some problem arose, which I don't recall at the moment, and you advised me Mr. Berger was local counsel. We had a problem about the procedure with respect to selecting the jury here and the record will reflect that.

MR. ENTIN: Mr. Wynn moved our admission, your Honor.

THE COURT: Mr. Wynn?

MR. LOWE: Mr. Wynn is another gentleman who represented Miss Palumbo, your Honor.

At the side bar, during the jury selection, Mr. Entin said that he did not need local counsel with him because Mr. Berger was local counsel.

MR. BERGER: Your Honor, I --

THE COURT: Just a moment.

(Pause.)

THE COURT: I gather we don't have that part of the record.

Mr. Reporter, do you know whether we have that part of the record here?

THE REPORTER: That is not transcribed, your Honor.

MR. LOWE: I assume we could have that transcribed, your Honor.

THE COURT: That was my recollection, Mr. Engin. It is not your recollection that you told me Mr. Berger was local counsel?

MR. ENTIN: To put the entire conversation in perspective, your Honor, I indicated to the court that I had relied on Mr. Berger specifically with regard to the question of jury instruction because

I was unfamiliar with the local rules. Your Honor informed me at that point, and rightly so, that if I coulnd't familiarize myself with the local rules, that was the position I was placing myself in.

What we suggest here is a different situation. Mr. Berger at no time has been co-counsel with me for the purpose of the representation of Thomas Zammas. We moved from the very inception of this matter, your Honor for separate joinder and separate trials. We have insisted all along that we had inconsistent and antagonistic defenses and to sit here and to indicate that we should have consulted with Mr. Berger as to his representation of a client we didn't even know he had would seem to stretch our responsibility in terms of consultation beyond that which is normally required.

MR. LOWE: Your Honor, I might point out that I have personal knowledge that Miss Gennaro is a personal friend of Thomas Zammas and was totally available, and if Mr. Zammas sat there and listened to the testimony of Mr. Wymbs and believed it wasn't true, he was aware Miss Gennaro could testify differently, because it is not a person unknown to the defendants. She was with them manytimes, worked with them constantly, and she testified in the grand jury in this district

that she was close friends with both of them.

MR. ENTIN: Your Honor, I don't think Brady material is subject to whether a person is a friend or not. Mr. Lowe gave me Brady material in this case and I never suggested Mr. Lowe has done anything wrong other than through inadvertence, and if I had, I apologize on the record. He gave me Brady material with regard to Henry Goldfarb, and I know Mr. Zammas knew Mr. Goldfarb and there was no question about it. Although Mr. Zammas could very well have known Darnice Gennaro. he may not have known she gave the government Brady material information which may have been exculpatory and may have had an effect upon the conduct of our defense in this case.

Our defense was predicated on a lack of such Brady material and we have prejudiced through no intentional fault of Mr. Lowe but still we have been ~~prejudiced~~.

THE COURT: We will check the transcript.

Mr. Reporter, you bring the transcript in the morning and we will look at Mr. Entin's statement.

MR. LOWE: May I telephone your Honor's chambers with a case? I know the case but can't recall the name of the case. I know it related to

Vincent Albano and the failure of the government to turn over Vincent Albano's grand jury testimony to the defendants and the decision of the Second Circuit was because Mr. Albano was a good friend of the defendants, the government had no obligation to do so.

THE COURT: You may bring that in in the morning.

MR. ENTIN: May we bring in authorities in the morning?

THE COURT: On what?

MR. ENTIN: With regard to the question on Brady material.

THE COURT: We all know the Brady case. There is no point. The government has no obligation. Nobody disputes that. The question here is whether this was something they had to turn over in view of the fact that Berger represents this lady and knew what her testimony or statement to the government was.

MR. BERGER: Your Honor, that is assuming that I knew what her testimony to the government was.

MR. LOWE: He just stood up and said he knew, your Honor.

MR. BERGER: As of last night I knew. Up to that time, I did not know.

(Adjourned to August 6, 1975, at 9:30 a.m.)

WITNESS INDEX

Name	Direct	Cross	Redirect	Recross
Peter Shaeffer	927			
Lawrence Lindsay	930	932	937	
Arthur Levine	939	941	954	
Edward J. Crooker	955	961	973 975	974

EXHIBIT INDEX

Defendant Zammas	Identification	In Evidence
L	956	

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UNITED STATES OF AMERICA

vs.

WILLIAM ERIC AIKEN, et al.

New York, August 6, 1975,

9:30 a.m.

Trial resumed.

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(In open court; jury not present.)

THE COURT: Good morning, ladies and gentlemen.

What I have decided to do, we will take up the matter as to the Brady material after the charge.

MR. ENTIN: Your Honor, may I reserve any other motion until after the charge?

THE COURT: Yes.

MR. BERGER: Your Honor, prior to your charging the jury, due to what happened yesterday, I got another charge, which is similar to instruction No. 39, which you have agreed to instruct the jury. This one is a slight modification to instruction No. 33.

THE COURT: I don't know what that 33 is now.

MR. BERGER: Failure to call witness

by either side, no inferences. And the reason I modify it is, I feel when Mr. Lowe went ahead and stated taht the defense could have called Darnice Gennaro he went beyond what is permitted by this instruction, and I would like this instruction read to the jury and I would like the court to tell the jury that --

THE COURT: What is the modification, please?

MR. BERGER: The modification is that -- I have added the words "And thus" -- I will read it how it stands now.

THE COURT: Please read the modification.

MR. BERGER: "And thus no inference may be drawn against defendants for failure to call such witnesses."

THE COURT: That would go at the end of what sentence, the third sentence?

MR. BERGER: "The law does not impose" --

THE COURT: That's the third sentence.

MR. BERGER: Yes, your Honor.

"Thus no inference may be drawn against the defendants for failure to call such witnesses."

THE COURT: All right, that will be done.

MR. BERGER: And at the end of the instruc-

tion "The jury should also bear in mind that the law never imposes on the defendant in a criminal case the burden of calling any witnesses and producing any evidence."

THE COURT: All right.

MR. ENTIN: Your Honor --

THE COURT: Just a moment.

What is it?

MR. ENTIN: There is just one additional modification. Request 34, your Honor agreed to give the charge that Constantinou, Aiken and Mrs. Aiken were admitted perjurers. I believe this was prepared prior to the time Mr. Wymbs admitted to Mr. Lowe on cross examination that he had lied. I think his name ought to be added to that.

MR. LOWE: Your Honor, I don't accept the proposition that Mr. Wymbs admitted that he lied. He certainly did not admit it in so many terms.

I asked him questions on redirect examination to focus his attention on what he had done in connection with those various stocks, after which he then admitted that he did in fact, because of what he had done, participate in the manipulation.

THE COURT: Did the other three witnesses

admit they were perjurers?

MR. LOWE: The other three witnesses referred to in the instruction the government does not object to because the three did admit that at certain points in time they had committed perjury. I don't think Mr. Wymbs should be included in that. I think it is for the jury to determine.

THE COURT: I don't recall that, Mr. Entin.

MR. ENTIN: I have the transcript. On page 657 Mr. Lowe asked the following question:

"Q Further down the page you were asked this question and did you give this answer:

"'Q Did you warehouse any of that stock?

"'A Warehouse any stock? You mean putting it into a warehouse? Would you define the term, sir? I am a businessman.'

"Q Did you give that answer?

"A Yes, I did.

"Q Did you understand the meaning of the question when it was asked?

"A Yes, I did, I believe. I believe warehousing, if it means the same as storing or putting away of something, a stock, warehousing it.

"Q And didn't you understand that that was the

question when you were asked that yesterday?

"A Yes, sir. When it was asked, yes, sir, I realized after it was asked, yes, sir.

"Q And you did do that, did you not?

"A Yes, I did.

"Q And those were among the things, were they not,that you were concerned about whether or not you would be prosecuted, isn't that true?

"A Yes, that's true."

And on page 654, your Honor --

THE COURT: Mr. Entin, the other persons, Aiken and Constantinou and Mrs. Aiken, admitted that they had previously lied under oath. Is there any such admission by Mr. Wymbs?

MR. KIMLER: In cross examination, your Honor, Mr. Wymbs denied that he had been involved in any manipulation whatsoever on direct. On redirect he admitted he had been untruthful during cross examination, and this found on pages 654 through 660, I think, approximately.

He had denied being involved in Indecon, in cross examination by, I believe, Mr. Berger, and on redirect of Mr. Lowe he was asked:

"Q Is it not a fact, Mr. Wymbs, that you also

placed orders for Indecon stock?

"A Yes, I did.

"Q Therefore, you did participate in the manipulation in that Indecon stock?

"A Participate in, yes."

He had denied those things explicitly in cross examination.

MR. LOWE: Your Honor, let me point to 655 of the transcript, in which I asked, in connection with the Tom Ward Stock, the question:

"Did you manipulate that stock by doing what you just said you did?" namely, putting in orders without having the money to pay for them, and his response was:

"If that is what manipulating is, then I did, yes."

What happened, your Honor --

THE COURT: Let's not debate it any further. I am not going to include it because it is debatable and it is for the jury, in any event, to determine the credibility of witnesses.

I will just say that some of the witnesses, for example, admitted to testifying falsely under oath and give the names of Pericles Constantinou, William Eric Aiken and Susan Aiken, since it is not disputed

that they have admitted that they previously lied under oath. There is a dispute about this and therefore it is for the jury.

Now, Mr. Berger, you requested the court to charge the jury that they can draw no inferences for the failure of the defendants to take the stand. Do you have a copy of that?

MR. BERGER: Yes, your Honor (handing).

THE COURT: Thank you.

No, I meant to say the defendants' failure to take the stand.

MR. BERGER: It's all part of the same instruction, your Honor.

The defendants' failure?

THE COURT: Yes.

MR. BERGER: No, I don't -- I have mine, your Honor, yes. I'm sorry.

THE COURT: Now, with respect to the Casa Bella matter, Mr. Lowe, you will recall that Mr. Aiken testified that initially, with respect to the instant matter, he did not want to deal with Mr. Zammas because Mr. Zammas had not paid him for a previous transaction.

MR. LOWE: Yes, your Honor.

THE COURT: That came up yesterday, and I don't recall at the time whether you offered that as a prior similar act. But do you recall during the closing argument of Mr. Entin that matter came up?

MR. LOWE: In the course of Mr. Aiken's examination an agreement between the government and Mr. Aiken was put into evidence in which, among other things, he admitted that he had taken money and failed to disclose it for writing articles about a list of stocks, included in which was the Casa Bella stock.

THE COURT: What I want to do is to point that out to the jury. Mr. Zammas is not on trial for that particular matter. Therefore, that testimony is to be considered only with respect to the intent and knowledge of Mr. Zammas..

MR. LOWE: The problem with that, your Honor, is that testimony must be considered in another sense because the discussions were part of the planning of what happened in this case.

THE COURT: In addition, yes. We went over that before. I remember at the side bar we discussed it, and we did say it was admissible on two grounds: One, as a prior similar act, and two, as

a part of this transaction. Mr. Aiken was telling us about his participation.

So I will instruct the jury that that is, if they so find, a possible similar act.

MR. ENTIN: Your Honor, the only thing I would suggest, from the proof that was presented in the trial, it is not a prior similar act because Mr. Aiken testified --

THE COURT: I am not going to argue about that. I just told you what I was going to do. I have gone over it twice in the record and it is my conclusion that they might find it is a similar act if they believe the testimony of Mr. Aiken.

You can object after the charge.

MR. ENTIN: I will object to that.

MR. BERGER: Your Honor, are you going to mention Miss Darnice Gennaro specifically? I feel her name should be mentioned specifically. That happened at the closing. It did not happen --

THE COURT: There are other witnesses that could have been called. What was the other man, Goldfarb?

MR. LOWE: Yes, your Honor.

MR. BERGER: The main problem, your Honor,

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is the closing argument of Mr. Lowe, which has left an inference with the jury with regard to Darnice Gennaro and I want that specifically covered.

MR. LOWE: Your Honor, what I asked the jury to do was not to make an inference against the defense, but I asked the jury to consider whether Mr. Berger's argument that Mr. Wymbs was a liar was based on evidence and that there wasn't any evidence, and I simply pointed out in response to his question to the jury, how do you prove a negative, you prove it if there is somebody who could come in and say it didn't happen. He didn't do that. And perhaps they would consider, in evaluating his argument in which he is asking the jury to draw an inference that Mr. Wymbs --

THE COURT: What is her name, D-a-r-n-i-c-e Gennaro?

MR. BERGER: Yes, your Honor.

THE COURT: I will include that.

MR. LOWE: Then, similarly, the government is entitled to an instruction the jury should draw inferences only from what happened in the case and not from what the lawyer said.

THE COURT: We are not going to take any more of this.

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Would you bring in the jury, please.

(Jury present.)

THE COURT: Would you make the announcement.

THE CLERK: The court is about to charge the jury. Any spectator who wishes to leave the courtroom may do so. If you wish to remain, please be seated and remain in the courtroom.

THE COURT: Did the marshal lock the door?

THE MARSHAL: Yes, I have.

THE COURT: Has everyone left the courtroom who desires to do so now?

THE CLERK: Yes, your Honor.

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CHARGE OF THE COURT

(Motley, J.)

THE COURT: Ladies and gentlemen, first of all, I want to thank you for your patience and for your cooperation in being prompt throughout this trial. I would also like to thank you for the careful attention which you have given to the testimony and other evidence as it has come in.

Now, I know that in order to serve on the jury, each of you has to make some personal or business sacrifice in order to do so. But I am sure you realize now, if you had not realized before, that when you serve on a jury you are playing a vital role in the administration of justice, and that trial by jury is a basic and cherished institution in our system. Consequently, I am sure that any personal or business sacrifice which you had to make in order to serve on this jury you were glad to do so in the interest of the fair and impartial administration of justice and the preservation of the right to trial by jury in our system.

Before formally beginning the charge, I would like to thank the lawyers on both sides for their cooperation with the court, and to congratulate each of them on the high degree of professional skill which

each has demonstrated throughout the trial.

I trust that you will bear with me now, ladies and gentlemen, and give me that same degree of attention which you have given to the testimony and other evidence in this case so that you may clearly understand the legal principles which you are to apply to the facts in this case as you find them.

As you approach the performance of your function in the case, which is to determine the guilt or innocence of each of the defendants on trial, please remember that it is your duty to weigh the evidence calmly and dispassionately, without sympathy or prejudice for or against either the government or either of the defendants.

You must bear in mind that every defendant appearing before this court is entitled to a fair and impartial trial, regardless of his occupation or station in life.

The fact that the government is a party here, that the prosecution is brought in the name of the United States of America, entitles it to no greater consideration than that accorded to any other party to litigation. By the same token, it is entitled to no less consideration, and that is because all parties,

government and individuals alike, stand equal before the law.

There are 12 counts in the indictment, and the word "count" is simply another word for charge. In other words, there are 12 separate charges made in the indictment against each of these defendants. Your verdict as to each count must be based solely upon the evidence in the case. And as I told you several times before, the evidence in a case consists of three things: the testimony which you heard from the witnesses who took the witness stand; any exhibits which were actually received into evidence; and any stipulations as to certain facts which the lawyers may have entered into and nothing else. Your verdict as to each count must be either guilty or not guilty, and your verdict as to each count must be unanimous. You must consider each count separately, and you must consider each defendant separately.

As the jurors in this case, you are the sole and exclusive judges of the disputed fact issues. You pass upon the weight of the evidence. You determine the credibility or believability of the witnesses. You resolve such conflicts as there may be in the evidence and you draw such reasonable inferences as may

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be warranted by the testimony and other evidence in the case.

With respect to any matter of fact, as I have told you previously, it is your recollection and your recollection alone which governs. Anything a lawyer may have said in the case or anything which I may have said in the case which does not accord with your recollection of the facts is not to be substituted in lieu of your own recollection of what the evidence shows.

It is my duty to instruct you as to the law applicable to the case, and you should accept the law as I state it to you in these instructions and apply it to the facts as you find them. The logical result of that application is a verdict in the case which, as I have said, must be returned as to each defendant separately and as to each count separately.

I want to caution you that you are not to single out any one instruction alone as stating the law, but you must consider these instructions as a whole.

You are not to assume that I have any opinion as to the guilt or innocence of these defendants or as to the truth or falsity of any charge made in the in-

dictment.

The fact that I have denied motions or granted motions in the course of the trial is not to be taken by you as an indication that the court believes the defendants to be guilty or not guilty, and as I believe I told you initially, these rulings had to do with questions of law and not with questions of fact.

If during the course of the trial a question was asked and an objection interposed and I sustained the objection, you are to disregard the question and any alleged facts contained in that question. Similarly, if I ruled that an answer be stricken from the record, you are to disregard both the question and the answer in your deliberations.

During the course of this charge, I may refer to certain facts in evidence or certain exhibits. The fact that I do that does not mean I think it is the only evidence in the case or the most important evidence in the case. That is to say, in determining the guilt or innocence of these defendants, you must consider all the evidence in the case, all the testimony both direct and cross examination, and all the exhibits, as well as the stipulations, if there were any, and I think there were one or two. You must consider, in

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other words, all the evidence in the case and not take any mention of any particular fact as important to the exclusion of some other fact.

As you well know, with respect to each change in the indictment, these defendants who are on trial have entered a plea of not guilty to each charge. As a result of having done that, a trial jury or petit jury such as you are has been convened, as I told you earlier, to determine whether the defendants are guilty or not guilty of the charge.

With respect to each charge, if a defendant is to be convicted with respect to a particular charge, the government has the burden of proof, and that is to prove that the defendant is guilty of a particular charge beyond a reasonable doubt. That is a burden that never shifts. It remains upon the government throughout the entire trial.

As I told you earlier, in a criminal case a defendant does not have to prove his innocence. On the contrary, a defendant in a criminal case is presumed innocent of any charge made against him in an indictment. This presumption of innocence was in each defendant;s favor when the trial started. It continued throughout the trial and is in his favor even as I instruct you

now. This presumption of innocence remains in the favor of each defendant during the course of your deliberations in the jury room. It is removed only if and when, after your deliberation, you are satisfied that the government has sustained its burden of proof, and that is to prove the defendant guilty of the particular charge beyond a reasonable doubt.

The question which naturally comes up is what is a reasonable doubt. The words almost define themselves. Reasonable doubt is a doubt found within and arising out of the evidence in the case, or the lack of evidence. It is a doubt which a reasonable person has after carefully considering all the evidence in the case, the kind of doubt which would make one hesitate to act. It means a doubt that is substantial and not merely shallow. A reasonable doubt is one which appeals to your reason, your judgment and your common sense and your experiences in life. In other words, it is not caprice, whim or speculation. It is not an excuse to avoid the performance of an unpleasant duty. It is not sympathy for a defendant.

If, after a fair and impartial consideration of all the evidence, you can candidly and honestly say that you are not satisfied of the guilt of a defendant whom

you are then considering and that you do not have an abiding conviction of that particular defendant's guilt, such a conviction as you would act upon unhesitatingly in important and weighty matters in the personal affairs of your own life, then you do have a reasonable doubt, and in that circumstance it is your duty to acquit the particular defendant that you are then considering.

On the other hand, if after such a fair and impartial consideration of all the evidence you can candidly and honestly say that you are satisfied of the guilt of the particular defendant you are then considering, that you do have an abiding conviction of that defendant's guilt, such a conviction as you would be willing to act upon unhesitatingly in important and weighty matters in the personal affairs of your own life, then you have no reasonable doubt, and in that circumstance you may convict the defendant.

A reasonable doubt does not mean a positive certainty or beyond all possible doubt. It is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible to mathematical certainty. In consequence, the law in a criminal case is that it is sufficient if the guilt of a defendant is established

beyond a reasonable doubt, not beyond all possible doubt.

You as jurors are the judges of the credibility, believability of the witnesses who testified here before you. And you are the judges of the weight to be accorded that testimony.

You know, of course, that there is no automatic way to decide who is telling the truth and who is not. Credibility, as I have indicated, can be equated with believability and reliability. If a witness is credible, you say he is believable and reliable. If he is incredible, you say he is unbelievable. In other words, there is nothing mysterious about these words.

Now, by what yardstick are you to judge the credibility of the witnesses? Each of you has given careful attention to the testimony of the witnesses as it came from the witnesses themselves. You observed the witnesses. Issues of fact are presented for your determination. An issue of fact is presented, for example, when one witness testifies a certain event occurs and another witness testifies that it did not occur. To a large extent the resolution of the disputed fact issues depends upon the credibility which

you attribute to the witnesses' testimony and the support or lack of support of their testimony received from other evidence in the case.

Your duty is to decide the disputed issues of fact. In doing so, use your logic, your reason and your common sense, and do not be sidetracked or diverted or distracted by what you consider to be a minor or insignificant detail or irrelevancy or by what you consider to be an appeal not to your reason or your logic but to mere sentimentality or unthinking passion. I repeat: use your common sense.

You should carefully scrutinize all the testimony given, both direct and cross examination, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive, state of mind, demeanor and manner while on the witness stand. Consider the witness' ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation a witness may bear to either side of the case and the extent to which all and each witness is supported or contradicted by other evidence in the

case.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or transaction may see or hear it differently. An innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy in the testimony, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

In determining credibility and weight to be given to the testimony of any witness, you should consider the testimony of the government's witnesses. The mere fact that they may be employees of the government entitles them to no more and no less consideration than any other witness. Nor should you be influenced by the number of witnesses a side has called or the number of documents received in evidence, because it is the quality of the testimony and other evidence which counts, not the quantity.

After making your own judgment, you will give the testimony of each witness such credibility, if

any, as you think it deserves. If you find that any witness -- and this applies to all witnesses who testify -- has wilfully testified falsely as to any material matter, you may reject the entire testimony of that witness or you may accept such part or portion as commends itself to your belief or which you find is corroborated by other evidence in the case.

You must realize, I am sure, that in many prosecutions for crime the government is frequently called upon to use as witnesses in the case persons who may be accomplices or who are accomplices. Often it has no choice. This is particularly so in cases where it appears that two or more persons have been involved in a joint criminal venture. Frequently it happens that only the members of the arrangement or venture have evidence which is relevant to and is important in a case. If accomplices could not be used, there are many cases where there is real guilt and where convictions should be had, but where convictions would not otherwise be obtainable except through the testimony of these accomplices.

During the course of the trial you have heard the testimony of persons, particularly Mr. Aiken, who testified concerning his involvement in the crimes

charged in the indictment. Now, he is a person, therefore, who is an accomplice. Under the law, for one to be an accomplice he must have been involved in the commission of the crime or crimes with which a defendant is charged. He must be a participant in that crime or crimes. An accomplice does not become incompetent as a witness because of his participation in a criminal act charged. His testimony is not to be rejected unless the jury thinks it has no weight. Like any other testimony, it is to be considered and dealt with by the 12 men and women who are the triers of the fact. Such evidence is properly considered with care and scrutiny, checked up with the other facts in the case, and given appropriate weight.

The testimony of an accomplice alone, if believed by you, may be of sufficient weight to sustain a verdict of guilty even though it is not corroborated or supported by other evidence in the case. You should keep in mind that the testimony of an accomplice, as I have said, is always to be received with caution and weighed with great care.

You are instructed that in weighing the testimony of government witnesses who have testified here for the government, you may take into consideration any

motive the witness may have when testifying for the government.

In addition, I want to point out -- and I am sure you know from the testimony -- that one of the witnesses, again Mr. Aiken, testified that he had pleaded guilty to a count in this indictment and has not yet been sentenced. And I believe there are other witnesses who testified that they had pleaded or expected to plead guilty to criminal charges. These facts do not disqualify the testimony of these men, but these facts may well affect the weight you give their testimony in judging the guilt or innocence of these defendants.

There were also witnesses who testified here, for example, Mr. Pericles Constantinou and Mr. Aiken and Mrs. Aiken, who testified that they had previously testified falsely under oath. In other words, they admitted to perjury. And again I want to point out that with respect to this, the testimony of an admitted perjurer must also be considered with caution and weighed with great care and checked up with the other facts in the case.

Evidence that a witness has been convicted in the past of certain crimes may also be considered

by you in determining the credibility of a witness. By this I mean that you may consider the prior conviction in determining whether the witness is worthy of belief.

The law requires every witness in a criminal case to answer all questions properly put to him, unless the court rules that he is privileged to answer on the Fifth Amendment or other grounds.

The court ruled that the witnesses Stanley Perlmutter and Robert Wymbs, I believe, at least those two, could refuse to answer certain questions asked of them by defense counsel if they believed that their answer to a particular question might tend to incriminate them. Now, as I have said, this is a privilege provided every person in our society by the Fifth Amendment to the Constitution, and is known as the privilege against self-incrimination. Perlmutter and Wymbs asserted this privilege and refused to answer certain questions. The fact that a witness refuses to answer a question on the ground of self-incrimination may also be considered by you in determining the credibility of that witness and the weight his testimony deserves.

The indictment names three persons, and when I get to reading the indictment, you will see that three

persons are named, Mr. Aiken in addition to the two defendants, but only two defendants, Mr. Zammas and Mr. Rodman, are on trial before you. Consequently, it is their guilt or innocence which you have to determine in returning your verdict. Although, as you realize, in determining the guilt or innocence of Mr. Rodman and Mr. Zammas, it will be necessary for you to consider the participation of others, such as Mr. Aiken.

I want to emphasize, therefore, that in the determination of innocence or guilt, you have to bear in mind that guilt is personal. The guilt or innocence of a defendant on trial before you must be determined separately with respect to that defendant. It must be based solely on the evidence presented against him, or the lack of evidence. That is to say that the fact that Mr. Aiken has pleaded guilty to a count in this indictment is not evidence that Mr. Zammas or Mr. Rodman are also guilty. A plea of guilty by one person that he is guilty is not evidence that somebody else is guilty. As I have said, the guilt or innocence of these defendants must be based solely on the testimony and the exhibits and the stipulations in this case. Therefore, the guilt or innocence of these

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defendahts is not to be influenced by the fact that Mr. Aiken has already pleaded guilty.

There are two classes of evidence recognized and admitted in courts of justice, upon either of which you may find an accused guilty of a crime. One is called direct evidence, the other is called circumstantial evidence.

Direct evidence tends to show the fact in issue without need for any other amplification, although, of course, there is always the question whether that evidence is to be believed.

Circumstantial evidence on the other hand, tends to show other facts from which the fact in issue may reasonably be inferred. Circumstantial evidence is that evidence which tends to prove the fact in issue by proof of other facts which have a legitimate tendency to lead the mind to infer that the facts sought to be established are true.

It is not necessary that the participation of a defendant be shown by direct evidence. The defendant's connections to a crime charged may be inferred from such facts and circumstances in evidence as would legitimately tend to support such an inference. Knowledge and wilfulness and intent of a defendant need not

be proved by direct evidence. Like any other fact in dispute, it may be established and proved by circumstantial evidence, that is, proof of other facts from which a defendant's state of mind may be proved.

In every criminal case it is necessary for the government to prove beyond a reasonable doubt that a defendant on trial had the necessary criminal knowledge, wilfulness and intent. Questions concerning a defendant's knowledge, wilfulness and intent involve proof of a defendant's state of mind at the time of the alleged crime.

Now, it is obviously impossible to prove directly the operation of a defendant's mind because you cannot look into a person's mind and see what hi s or her intentions are or were. But proof of the circumstances surrounding a defendant's activities may well supply an adequate and convincing basis for finding that a defendant acted knowingly, wilfully and intentionally.

In other words, the actions of a defendant must be judged in their time and place. Just as the full meaning of the word is commonly understood only in relation to the other words in a sentence or in its context, so the meaning of a particular act or conduct on the part of a defendant may depend upon the circum-

stances surrounding that act or conduct.

In determining the issue of knowledge, wilfully, or intent, you are entitled to consider any statements in evidence made by the defendant and any acts in evidence allegedly done by the accused, and all other facts and circumstances in evidence which may aid you in determining the defendant's state of mind. You may consider such things as the age, background, occupation and experience of a defendant, and whether these facts make it likely or unlikely, probable or improbable that a defendant fully and precisely understood what he was doing in regard to a transaction and where relevant in relation to others.

As I told you when you were being selected, and before the trial here commenced, an indictment is not proof or evidence; it is merely an accusation. It is a technique or method or procedure which we employ in our system whereby persons are accused by a grand jury of crimes and then they are brought into court where their guilt or innocence is determined by a petit jury or trial jury such as you are. Therefore, the indictment which I am about to read to you in this case, is not proof or evidence. It should not be considered by you as proving or tending to prove any of the

crimes charged.

As I have told you, with respect to each crime the government has the burden of proving that the charge is made against the defendant and that the defendant is guilty of that charge beyond a reasonable doubt. And as I have told you, the indictment here contains 12 counts and the defendants have pleaded not guilty, and in thus denying their guilt, the defendants have put in issue the essential elements of each crime charged.

What I am going to do is to read, therefore, the indictment, and then I am going to tell you or enumerate for you each of the elements of the crime charged which you must find that the government has proved beyond a reasonable doubt before you can find a defendant guilty of that charge.

If you find that the government has failed to prove any one of those elements, then of course you must acquit the defendants.

Turning to the indictment, therefore, I will read the indictment and the indictment is in two parts essentially. It is a group of six charges. The first six charges charge a violation of the mail fraud statute. The second group of six charges charge

a violation of one or our federal securities laws.

The indictment reads as follows:

"The grand jury charges" -- and this is with relation to the first six counts:

"1. At all times relevant herein, Power Conversion, Inc., a New York corporation, with principal offices at 70 Mac Questen Parkway South, Mt. Vernon, New York, the common stock of which was publicly traded on the over-the-counter market, was a manufacturer of lithium cells and batteries.

"2. At all times relevant herein, Value Line Selection and Opinion was part of the Value Line Investment Survey published by Arnold Bernhardt & Company, Incorporated, a registered investment advisor, with principal offices at 5 East 44th Street, New York, New York.

"3. At all times relevant herein, William Eric Aiken was the editor of Value Line Selection and Opinion.

"4. At all times relevant herein, William Rodman was a registered representative and trader for C. I. Oren & Company, Incorporated, a registered broker-dealer with principal offices at 39 Broadway, New York, New York, which was making a market in the

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common stock of Power Conversion, Incorporated.

"5. At all times relevant herein, Thomas Zammas was a self-employed securities dealer.

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"6. At all times relevant herein, William Rodman and Thomas Zammas were dealing in the common stock of Power Conversion, Incorporated.

"7. On or about September 29, 1972, in the Southern District of New York and elsewhere, the defendants, William Eric Aiken, William Rodman, and Thomas Zammas, unlawfully, wilfully and knowingly, having devised and intending to devise a scheme and artifice to defraud Arnold Bernhardt & Co., Inc., the subscribers and readers of Value Line Selection and Opinion, and the owners and potential purchasers of common stock of Power Conversion, Inc., and to obtain money and property by means of false and fraudulent pretenses, representations, and promises, and for the purpose of executing said scheme and artifice to defraud and attempting so to do, did cause to be delivered by mail, according to the directions thereon, certain matter to be sent and delivered by the post office department.

"8. It was a part of said scheme and artifice to defraud that that (a) defendants William Rodman and Thomas Zammas, who were dealing in the common stock of Power Conversion, Incorporated, and promoting the sale thereof, would and did secretly pay a $15,000 bribe to the defendant Eric Aiken in return for which the defendant Eric Aiken agreed to write and publish an article in

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Value Line Selection and Opinion, recommending the purchase of Power Conversion stock, without disclosing in said article or elsewhere the material fact that the defendant Eric Aiken had received and accepted said bribe;

(b) defendant Eric Aiken would and did write said article and caused it to be published in the September 29, 1972 issue of Value Line Selection and Opinion, which purports to be an independent, objective analysis of the stock of publicly traded corporations, falsely and fraudulently failing to disclose therein or elsewhere the material fact that the defendant Eric Aiken had received and accepted a $15,000 bribe from defendants William Rodman and Thomas Zammas in order to induce him to write said article.

"9. On or about September 29, 1972, in the Southern District of New York and elsewhere, William Eric Aiken, William Rodman and Thomas Zammas, the defendants, unlawfully, wilfully and knowingly for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did cause to be delivered, by mail, according to the direction thereon, from 5701 Kennedy Boulevard, North Bergen, New Jersey, to the persons hereinafter set forth in Counts 1 through 6, the September 29, 1972 issue of Value Line Selection and Opinion.

"Count 1. First National City Bank, 399

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Park Avenue, New York, New York, 10002." That is the first count, the addressee.

The second count gives as the addressee New York Life Insurance Company, Mr. R.M. Brown, Jr., president, 51 Madison Avenue, Room 1304, New York, New York, 10010.

Count 3, addressee: E.F. Hutton & Company, Incorporated, 1 Battery Park Plaza, New York, New York, 10004.

Count 4. Chemical Bank, New York Trust Company, 277 Park Avenue, New York, New York, 10017.

Count 5. Missouri National Insurance Ohio, 19 Rector Street, New York, New York, 10006.

Count 6. Loeb, Rhoades & Co., 375 Park Avenue, and it looks like "STE" which may stand for "station," 2501, New York, New York, 10022.

And the indictment cites Title 18, United States Code, Section 1341 and 2.

Now, Section 1341 of Title 18 reads as follows:

"Whoever having devised or intending to devise any scheme or artifice to defraud or for obtaining money by means of false or fraudulent pretenses, representations or promises for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the postal service,

or knowingly causes to be delivered by mail, according to the direction thereon, any such matter or thing, shall be guilty of a crime."

Now, in order to find a defendant on trial before you guilty of mail fraud statute, you must find the Government has established beyond a reasonable doubt each of the following elements:

1. That on or about the date alleged in the indictment, the defendants under consideration devised or intended to devise a scheme or artifice to defraud or to obtain money by fraudulent pretenses or representation.

2. That the defendants did devise or became a party to such a scheme or artifice, knowingly and wilfully, with knowledge of its fraudulent nature, and with intent to defraud.

3. That for the purpose of executing the scheme or artifice that the defendant did use or caused another to use the mails.

As you gathered by my reading of the indictment, all of the first six counts charge a violation of the mail fraud statute in that each of the six firms or individuals listed in Counts 1 through 6 allegedly were mailed a copy of Value Line of September 29, 1972, as alleged in the indictment.

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Now I am going to tell you in greater detail about each of these, something about each of these three elements which I have just read, which you must find that the Government has established before you can find a defendant guilty of any of these mail fraud charges.

The first element of the offense is the existence of a scheme or artifice to defraud. The language describing this first element is almost self-explanatory.

A scheme or artifice is merely a plan for accomplishing an objective. Fraud is a generic term which embraces all of the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain an advantage over another by false misrepresentations, suggestions or by supression of the truth. Thus, a scheme to defraud is merely a plan to obtain money or property or some advantage of value by trick or deceit.

With respect to the second element, that is, that you must find that the defendants devised or became a party to a scheme or artifice, knowingly and wilfully, with knowledge of its fraudulent nature and with intent to defraud, you must find, as I indicated, that the defendant acted knowingly and wilfully.

In other words, I want to emphasize this point, that in order to convict a defendant on any count, you must

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find beyond a reasonable doubt that he acted unlawfully, knowingly and wilfully.

Now, unlawfully obviously means contrary to law. An act is done knowingly if it is done voluntarily and purposely and not because of mistake, accident, mere negligence or other innocent reason.

An act is done wilfully if it is done knowingly, deliberately, intentionally and with an evil motive or purpose.

In determining whether a defendant has acted wilfully, it is not necessary for the Government to establish the defendant knew that he was breaking any particular law or any particular rule. It must, however, prove a bad purpose or motive on the part of the defendant. Knowledge and wilfulness and intent of a defendant need not be proved by direct evidence, as I told you earlier, like any other fact in issue, it may be established by circumstantial evidence as I previously defined that term for you.

Now, with respect to the defendant Zammas, there was testimony by Mr. Aiken to the effect that he had initially refused to involve himself with Mr. Zammas in the charges made in this indictment because he had previously been involved with Mr. Zammas in another similar kind of situation.

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With respect to that, I want to point out that Mr.Z ammas is not on trial for that particular matter and I believe Mr. Aiken referred to that as the CasaBella matter.

Now, with respect to that testimony , if you believe the testimony of Mr. Aiken with regard to that, you may consider that in determining whether Mr.Zammas acted with guilty knowledge or unlawful intent on the charges before you.

But,again, I point out that in considering that testimony, you may consider that testimony only with respect to the question of whether Mr. Zammas acted knowingly and wilfully and intentionally.

The final element of the mail fraud charge is that for the purpose of executing the scheme or artifice, you must find that the defendant used or caused another to use the mails. In order to constitute a violation of the mail fraud statute, the use of the mails must be in furtherance of the scheme to defraud. The mail fraud counts which are being submitted to you each charge a separate use of the mails. The gist of this crime is the use of the mails and each separate use of the mails in furtherance of the scheme constitutes a separate and distinct offense.

It is not necessary for the Government to prove defendant actually placed any of the items listed in the indictment in the mail. It is sufficient for the Government to prove that the defendant caused a mailing to be made in the ordinary course of business, which mailing was made in furtherance of the scheme. If the defendant is found by you to have taken steps which he knew or could reasonably have foreseen at the time, would naturally and probably result in the use of the mails, then he has caused the mails to be used.

And, it is sufficient if the items charged in the indictment were mailed by an agent of the defendant or by someone who relied upon the defendant's representations in furtherance of the scheme to defraud.

It is not necessary that the Government prove as to each defendant that he knew of or participated in the mailing of the various items set forth in Counts 1 through 6 of the indictment. It is sufficient if you find that he participated in the scheme to defraud in some measure, as I have already instructed you, and could reasonably have foreseen that the mails would be used.

Under such circumstances, the mailing is chargeable to him, whether or not he knew of it.

The Government, as I have told you, has the

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burden of proving these essential elements, but it is not necessary to prove that every step of the scheme was accomplished. The crime is complete, that is, the crime of mail fraud is complete when the scheme is conceived and the mails are used in an attempt to defraud or to execute the scheme.

Thus, in order to come within the terms of the mail fraud statute, it is not necessary that anyone be deceived. The offense is committed when the scheme has been devised and in pursuance of the scheme the mails have been used. Here the Government need not show that anyone actually relied on the Value Line article. If the defendants caused the article to be published as part of a deliberate scheme to defraud or to obtain money or property by false representations intending others to rely upon it and set in motion steps that would normally be expected to lead to the use of the mails and the mails were in fact used, that would be sufficient.

Because a crime is a scheme and not the result of the scheme, I instruct you that in order to convict, it is not necessary for you to find that the defendant realized any gain whatsoever from the whole episode. It is not necessary that the intended victims suffer any loss whatsoever. The question is, did the defendant knowingly

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devise a scheme to defraud and did he use or cause to be used the mails in furtherance of the scheme.

If and when the existence of the scheme or artifice charged in the indictment and the participation of any or all the defendants in such a scheme or artifice has been found, then the acts done and the statements made by any person found by you to be a party to the scheme, whether or not such person is a defendant, may be considered as to any defendant whom you find has been a party to the scheme, even though such acts and declarations may have been made in the absence of the defendant and without the knowledge of the defendant, provided that such acts were done and such statements were made by a co-schemer within the scope of the scheme during its continuance and in furtherance of its illegal purpose and common objective.

Now again, with regard to each count, that is, 1 through 6, if you find that the Government has failed to establish any one of the three elements which I have just enumerated and discussed, beyond a reasonable doubt, then you must acquit the defendant.

If, on the other hand, you find that the Government has established each and every one of these elements beyond a reasonable doubt as to the particular defendant, you are then considering, you may find the defendant guilty.

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Now we come to the next group of counts in the indictment, Counts 7 through 12.

The indictment with respect to those counts reads as follows:

"The grand jury further charges:

"1. On or about September 29, 1972, in the Southern District of New York and elsewhere, the defendants, William Eric Aiken, William Rodman and Thomas Zammas, unlawfully, wilfully and knowingly, by the use of the mails, as hereinafter set forth, did cause to be published and circulated an article in the September 29, 1972 issue of Value Line Selection and Opinion describing the common stock of Power Conversion, Incorporated, without disclosing in any way a $15,000 bribe paid as consideration for said article to the defendant William Eric Aiken by the defendants William Rodman and Thomas Zammas, who were dealers in the stock of Power Conversion, Incorporated.

"2. On or about September 29, 1972, in the Southern District of New York, William E. Aiken, William Rodman, Thomas Zammas, the defendants, unlawfully, wilfully and knowingly, did cause the September 29, 1972 issue of Value Line to be delivered by mail to the persons hereinafter set forth in Counts 7 through 12."

In Counts 7 through 12 the same persons who are

named as in Counts 1 through6 are again named: Count 7: First National City Bank, 399 ParkAvenue, New York, New York, 10022.

8. New York Life Insurance Company, Mr. R.M. Brown, Jr., president, 51 Madison Avenue, Room 1304, New York, New York, 10010.

9. E. F. Hutton & Co., Incorporated, One Battery Park Plaza, New York, New York, 10004.

10. Chemical Bank New York Trust Company, 277 Park Avenue, New York, New York, 10017.

11. Missouri National Insurance Ohio, 19 Rector Street, New York, New York, 10006.

12. Loeb, Rhoades & Company, 375 Park Avenue, STE. 2501, New York, New York, 10022.

And the indictment cites Title 15, United States Code, Sections 77Q(b) and Section 2.

Section 77Q(b) which I have cited, reads as follows:

"It shall be unlawful for any person by use of any means or instruments of transportation or communication of interstate commerce or by use of the mails to publish, give publicity, or circulate, any notice, circular, adver-. tisement, newspaper, articles, letter, investment service or communication which though not purporting to offer a

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security for sale, describes such security for a consideration received or to be received,d irectly or indirectly, from any issuer, underwriter or dealer without fully disclosing the receipt, whether past or prospective for such consideration and the amount thereof."

This section, which I have just read to you, 77Q(b) is particularly designed to meet the evils of the tipster sheet, as well as articles and newspapers or periodicals that purport to give an unbiased opinion, but which opinions are in reality bought and paid for.

In order to find a defendant on trial before you guilty of violating that statute, it is necessary for you to find that the Government has proved beyond a reasonable doubt each of the following four elements of that crime: First, that a person by use of the mails has published or circulated an article describing a security.

Second, that consideration for such publication or circulation has been received or promised from a dealer.

Third, that there has been no disclosure of the payment made or promised or the amount of such consideration.

Fourth, that the article has been wilfully and knowingly circulated.

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Now, again with respect to Counts 7 through 12, they all charge a violation of that statute.

I am going to discuss in a little greater detail each of those four elements. The first element, use of the mails to circulate an article, I have already instructed you that in prosecutions for using the mails to defraud, it is not necessary for the Government to prove that any of the defendants actually placed the article in the mail. It is sufficient for the Government to prove that the defendant caused a mailing to be made in the course of business. It is enough that the defendant took steps which he knew at the time might naturally and probably result in the use of the mails.

In this respect you must bear in mind the charge which I just gave you in connection with the mail fraud statute, and the use of the mails.

The second element: Receipt or promise of consideration from a dealer. In order to find a defendant guilty of the second element of a crime, it is necessary that the Government prove beyond a reasonable doubt that a promise to pay consideration has been offered by a dealer, to have the article Power Conversion published.

In this case the Government contends that the defendants Rodman and Zammas promised a consideration

to Eric Aiken for publishing the Power Conversion article. The Government contends that the consideration was $15,000 in cash, plus some Power Conversion options.

The Government contends that at the time the money was promised to Aiken, the defendants Rodman and Zammas were both dealers, within the contemplation of the statute.

In order to find the defendants guilty you must find beyond a reasonable doubt that they were dealers.

The law defines a dealer as any person who engages either for all or part of his time, directly or indirectly, as agent, broker or principal, in the business of offering, buying, selling or otherwise dealing or trading in securities issued by another.

I charge you as a matter of law that the common stock of Power Conversion, which was the subject of the article in question in this case is a security within the meaning of the statute which I just read to you.

The third element: Non-disclosure. If you find that money or other consideration has been promised or paid for an article which will be circulated by mail, then you must determine whether the promise or amount of consideration has been made public or disclosed. If you find that the money was transferred secretly, that

will be sufficient to satisfy the third element.

The fourth element is that the defendants acted wilfully and knowingly.

I have already described or defined those terms for you in connection with the mail fraud statute.

There has been some reference to the motive of the defendant to violate the laws with which he is charged. I charge you that proof of motive is a necessary element of the crime of which the defendant is charged. Proof of motive does not establish guilt or does it establish that the defendant is innocent. If the guilt of the defendant is shown beyond a reasonable doubt it is immaterial what the motive for the crime may be or whether any motive be shown, but the presence or absence of motive is a circumstance which the jury may consider as bearing on the intent of the defendant.

Again, with respect to each ount, if you find that the Government has failed to establish any one of the essential elements of the crime of touting, that Ihave just enumerated for you, beyond a reasonable doubt, you must acquit the defendant of the particular charge which you are then considering.

If, on the other hand, you find that the Government has established each of these four elements beyond

a reasonable doubt as to the particular defendant you are considering, you may find the defendant guilty.

Now, with respect to the mail fraud count, and withr espect to the touting statute, the indictment cites Title 18, United States Code, Section 2, as also being violated by the defendants with respect to those charges.

That statue reads as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commissior, is punishable as a principal."

Then the statute reads: "Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States is punishable as a principal."

That is known as the aiding and abetting statute.

Accordingly you may find a defendant guilty of a mail fraud count or a touting statute violation, if you find beyond a reasonable doubt that another person wilfully committed the offense and that the defendant whom you are then considering, a ided and abetted the commission of that offense, or that the defendant you are considering caused the crime to be committed by an innocent agent.

Now, there is no precise rule as to what acts

a defendant must perform in order for you to find that he is an aider and abettor. It is enough that you find a defendant knowingly associated himself in some manner with the illegal venture, actually participated in it as something that he wished to bring about or that he sought by his action to make it succeed.

In this connection you may consider whether the defendant had a stake in the venture. In other words, the law is that one who aids and abets another or causes another to commit an offense, with knowledge of the unlawful nature of the offense, is just as guilty of that offense as if he committed the offense himself.

To find a defendant guilty of aiding and abetting you must find something more than mere knowledge on his part that a crime is committed. Thus a mere spectator of a crime is not a participant. Consequently in order to find a defendant guilty of aiding and abetting you must find that this defendant with knowledge of the unlawful purpose in some way associated himself with the illegal activity, that he knowingly participated in it as something he wished to bring about and he knowingly by his actions endeavored to make it succeed.

Now, the law does not compel a defendant in a criminal case to take the witness stand and testify, and

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no presumption of guilt may be raised and no inference of any kind may be drawn from the failure of a defendant to testify; as stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

If the Government has failed to call a witness who is equally available to both sides, you may not draw an inference that his or her testimony would have been unfavorable to the prosecution. There is no presumption against the Government from its failure to call witnesses if it should appear to you that their testimony would be merely cumulative or repetitious and have no greater value than of witnesses who have testified.

The law does not impose upon a defendant, as I have said a moment ago, the duty to call as witnesses any persons who are shown to have been present, such as Darnice Gennaro, who was mentioned yesterday, any persons involved in the evidence, or who appear to have knowledge of the matters in question, thus no inference may be drawn against defendants for failure to call such witnesses Both sides have the right to interview witnesses at any time before the trial and subpoena witnesses to request them to be in court. The jurors should always bear in mind, as I have said, that the law never imposes upon a defendant

the duty or burden of calling any witnesses.

Now, ladies and gentlemen, the most important part of this case is the part which you now as jurors are about to play, because it is for you and you alone to decide whether a defendant who is on trial before you is either guilty or not guilty as to a particular count in the indictment.

I know you will try the issues that have been presented to you according to the oath which you have taken as jurors. In that oath you promised that you would well and truly try the issues joined in this case and a true verdict render.

I suggest to you that if you follow that oath and try the issues, without combining your thinking with any emotions, then you will arrive at a true and just verdict.

It must be clear to you that once you get into an emotional state and let fear, prejudice or bias or sympathy interfere with your thinking, then you will not arrive at a true and just verdict.

As you deliberate, ladies and gentlemen, please be careful to listen to the opinions of other juors as well as to ask for an opportunity to express your own views. No one juror holds the center stage in the jury room and

no one juror may control or monopolize the deliberations.

If, after listening to your fellow jurors and if after stating your own view you become convinced that your view is wrong, do not hesitate because of stubbornness of price of opinion to change your view.

On the other hand, do not surrender your honest conviction solely because of the opinion of your fellow jurors because you are outnumbered.

Under your oath as jurors, you are not to be swayed by sympathy. You are to be guided solely by the evidence int he case and the crucial hard core question that you must ask youselves as you sift through the evidence is, where do you find the truth? This is a quest for truth. That is what a trial is. It is not a battle of witnesses. It is not a contest of salesmanship and it is not a contest in personalities. The only triumph in any case, whether it be civil or criminal, is whether or not the truth has triumphed.

If it has,then justice has been done. If not, justice will not have been done.

As I have said before, you are to determine the guilt or innocence of each defendant solely on the basis of the evidence, and the instructions which I have just given you.

Now, the jury is not to consider or in any way to speculate about the punishment which a defendant may receive if he is found guilty. The function of a jury is to determine the guilt or innocence of a defendant on the basis of the evidence and the Court's instructions. It is for the Court or the Judge alone who has the duty of determining the sentence, if there is a conviction, so that that matter of punishment or possible sentence should not enter into your discussions.

You must return a verdict, as I have said, as to each count in the indictment. The form of your verdict as to each count is either guilty or not guilty.

You may return a verdict of guilty as to each count. You may return a verdict of not guilty as to each count.

You may return a verdict of guilty as to some counts, and a verdict of not guilty as to others.

If you are not able to agree on a verdict as to a particular count or as to several counts, you may not compromise about finding the defendant guilty on certain counts and not guilty as to others. The verdict on each count must be unanimous and must reflect the conscientious convictions of each and every one of you.

When you retire to the jury room to deliberate

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you may send for any exhibits which you desire to review or have any of the testimony read back. You are instruc that you are not to reveal the standing of the jurors, that is, the split of the vote for any verdict to anyone including the Court at that time during deliberation.

Now will counsel for the parties approach the bench in the robing room.

(In the robing room.)

THE COURT: Mr. Berger, do you have any exceptions to the charge?

MR. BERGER: Yes, I except to the rejection of every instruction requested by the defendant Rodman, and I also except specifically to permitting the jury to have the transcript, if they should call for it.

THE COURT: The transcript?

MR. BERGER: I thought that I heard your Honor say should they call for the transcript they may be able to have it. I object to that.

THE COURT: No, I didn't say that. Read what I said at the end, Mr. Reporter.

(Record read.)

THE COURT: Anything further?

MR.BERGER: I would just join in the objections to be made by Mr. Entin and his associates, because they

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were taking notes. We had discussed previously they would be enumerating them.

THE COURT: All right.

MR. KIMLER: Your Honor, we have several as to I believe Government's request No. 19, which your Honor gave, listing the elements of touting violation and particularly the third element. We strenuously object to that charge in that it has nothing to do with it. " But there has been no disclosure of the payment--" that is not quite the law. There must be intent involved in the non-disclosure and we would object to that.

We strenously object to No. 24 of the Government's request which your Honor gave which reads that if we find the money was transferred secretly that would be sufficient to satisfy the third element. We object to that. That is almost tantamount to directing a verdict of guilty.

We have several other objections we would like to enumerate for the record. I believe our good faith instruction request, Number 9, was not given, and we believe that is a legitimate defense and the charge should be given. We strenuously object to the charge relating to Casa Bella and defendant Zammas.

I believe during the course of the trial there

were several objections made to that and we don't believe that should have been brought up. The charge on publication although your Honor indicated yesterday -- that was Request 21 -- wasn't given.

THE COURT: What was that again?

MR. ENTIN: Our Request 21, which your Honor indicated you would give.

THE COURT: How does it read?

MR.K IMLER: I didn't get a chance to pick it up --

THE COURT: About somebody who publishes?

MR. ENTIN: That it has to be published and it defines publication and publisher, and your Honor indicated you would give it.

THE COURT: I don't think there is any real issue about this. The jurors understand publish. We have charged that. They had to publish an article, circulate it. That merely defines "publish."

MR. KIMLER: The last thing I have here in my notes was the instructions on circumstantial evidence. We would prefer more detailed instruction. We would take exception to those objections we have made here and to any charge we requested that wasn't given.

MR. LOWE: Your Honor, I don't know if this

is necessary to make a point on it. I may have misheard but I think your Honor referred to the Casa Bella evidence as Casa Blanca. It is Casa Bella, the name of the company involved. I am not sure that it matters. I just raise it in case anyone cares --

THE COURT: I didn't quite remember the name. Let's go back to the courtroom.

(In open court.)

THE COURT: At this time we are going to excuse the alternate jurors, Mr. Cox and Mr. Mesher. O n behalf of the citizens of the Southern District of New York, this Court thanks you for your service on this jury. I am sorry that you will not get an opportunity to deliberate with your fellow jurors after having sat through this trial, but I am afraid that is often the fate of alternate jurors. However, I am sure you realize that your services were essential in the event that one of the regular jurors became incapacitated. So you are excused with the thanks of the Court.

Would you please take what you have in the jury room and leave before the others have come in, and the marshal will show both of you out.

We will have the marshal sworn and the jurors can then retire to the jury room.

(Marshal sworn.)

(Jury left the courtroom.)

THE COURT: We will take a recess. Do you have a memorandum, Mr. Lowe?

MR. LOWE: Yes, your Honor.

THE COURT: Mr.Berger?

MR. BERGER: No, your Honor.

MR. ENTIN: Your Honor, what I suggested --

THE COURT: We will take up this matter later. We will take a recess.

(Recess.)

(In open court.)

THE COURT: Mr.Reporter, doyou have the transcript of what transpired at the end of the jury selection process?

(Discussion off the record.)

THE COURT: Mr. Entin and Mr.Berger, have you had a chance to review the Government's memorandum submitted this morning on this matter of the Brady material?

MR. BERGER: Yes, your Honor.

MR. ENTIN: I have,your Honor.

THE COURT: Do you have anything further you want to say on it, Mr.Berger?

MR. BERGER: Yes, your Honor. I would like to address myself to the fact pattern because the memorandum of course is dependent upon the accuracy of the facts.

THE COURT: You may be seated, Mr. Entin, until he is finished.

MR. BERGER: I didn't represent Darnice Gennaro during the time she was being questioned about Power Conversion. As to the best of my recollection the first time I represented Darnice Gennaro was either when she was severed or was told she was to be severed with a subpoena to appear before a grand jury, Ibelieve, in the case of Indecon and Tom Ward.

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Now, at that time I had called Mr. Lowe and asked for an adjournment. There was some discussion concerning Mr. Rodman, and Mr. Lowe indicated to me that he believed I had a conflict, if I were to represent Miss Gennaro and Mr. Rodman. He thereafter sent me a letter which set forth our conversation and the fact that he believed there would be a conflict. He did adjourn, I believe from the letter, the grand jury appearance of Miss Gennaro from one date to June 10.

I spoke to Miss Gennaro and I told her that because of the position taken by Mr. Lowe, I could not represent her. I didn't appear with Miss Gennaro before the grand jury. I didn't discuss Power Conversion with her. I didn't, as I said, go to the U. S.Attorney's office with her on Power Conversion or Indecon or Tom Ward. Indecon andTomWard I didn't go because of this letter.

After Mr. Wymbs testified, I became concerned about the fact whether Miss Gennaro was a party to the facts as testified to by Mr. Wymbs. I believe it was the night before last that I contacted Miss Gennaro, got her on the phone and I asked her whether she was present at any meeting in August or September 1972, at the apartment at 35th Street and Lexington Avenue.

She told me that she was not, that she had not

been to that apartment from May 1972 up through towards the end of October 1972. I was concerned about the fact that she told me that, and yet if I would call her as a witness, not having been advised by the Government that there was possible Brady material or exculpatory material, that perhaps she was not recounting the facts to me in all candor.

If I had been told that there was Brady material, if I had no fear of facing aprior inconsistent statement made before the U. S. Attorney, I would have probably called her.

On the other hand, your Honor, she did tell me that when she went to the U. S. Attorney's office, she did tell Mr. Lowe exactly what she told me, that she told Mr. Lowe that she hadn't been there from May up through close to the end of October.

So my problem really was, do I believe her, do I want to take a chance, want to take a risk, am I willing to put her on and be hit with an inconsistent statement either to someone in Mr. Lowe's office or to Mr. Shaeffer. If I was told plaintiff's exculpatory material with regard to this case from Miss Gennaro,perhaps I would have taken the risk.

Your Honor, I can't definitely say that Iwould

have, but perhaps, I believe I would have. It is difficult for me now to look back, three days, and say what I would have done. I don't know.

As far as me telling Mr. Entin, no, I didn't tell him. I didn't really think anything of it. I was so concerned with my client that I just didn't tell Mr. Entin my thought process and what I had learned.

I don't know if I was obligated to tell him. I am not local counsel. Mr. Wynn is. Mr. Entin has always taken the position that we have a conflict in defenses. He has asked for severance in the past and asked for severance during the trial. Part of his cross-examination I objected to as prejudicial to Mr. Rodman. Perhaps I should have shared my knowledge with him, but my knowledge was gained after Mr. Wymbs testified. My knowledge didn't come from the U. S.Attorney's office, and the truthfulness or accuracy of the facts as given to me by Miss Gennaro, I had no foundation from the U. S. Attorney's office as to how far I could rely.

I can only say this, your Honor, had I received a communication from Mr. Lowe that there was exculpatory material in the U.S . Attorney's office with regard to statements that Miss Gennaro made to the U. S. Attorney's office,perhaps I would have acted differently. Perhaps

I would have said something to Mr. Entin. I can't say definitely, your Honor.

THE COURT: Let me ask you this: Is it true, as the Government asserts that Miss Gennaro was the girl friend of Mr. Rodman?

MR. BERGER: Miss Gennaro tells me for a short period of time she was, that from May through October she was not, that they had an argument or something. May through October she was not. Then perhaps for a few months from my understanding, she might have been and then there was a complete breakoff. At the present time, your Honor, I don't know whether Miss Gennaro has ill feeling against Mr. Rodman, is hiding one, if it is latent, if she would testify. I don't know that. But from the period of time as I have been told, from May through October, it is my understanding that for that period of time she was not the girl friend.

THE COURT: Prior to the trial, you knew that Miss Gennaro had been questioned by the United States Attorney's office and appeared before a grand jury?

MR. BERGER: I knew she had appeared before a grand jury on Indecon, as reflected by the letter from Mr. Lowe.

May I give you the letter, your Honor?

THE COURT: Yes, you may pass it on (handing).

Thie letter to you, Mr. Berger, is dated May 27, 1975, which is just shortly before this trial, relatively speaking.

MR. BERGER: Yes, your Honor.

THE COURT: At that time, according to this letter you were representing Miss Gennaro?

MR. BERGER: With regard to that matter, your Honor, which was just Tom Ward and Indecon.

THE COURT: Yes. And you also were representing Mr. Rodman?

MR. BERGER: Until Mr. Lowe stated that he believed I had a conflict at which time I withdrew.

MR. LOWE: Your Honor, I take exception to that. Mr. Berger told me that that was none of my business, that he would continue to represent her because he didn't believe there was a conflict and when Miss Gennaro appeared in the grand jury she said Mr.B erger was still her lawyer and I don't think Mr.Berger ever bothered to tell the United States Attorney of this withdrawal which he now claims he has made.

MR. BERGER: Your Honor, I didn't appear before the grand jury with the witness, I don't know what she said to the grand jury, but I was not there, I didn't

counseh her, and I intentionally didn't go there. If I was her attorney, I would have been there. I don't know what she said to the grand jury. All Iknow is that Mr. Lowe was reprimanded by the foreman of the grand jury for his actions towards Miss Gennaro. That is the only thing I was told happened. I don't know whether she said I was her attorney or not.

THE COURT: How did you gain that information as to what occurred before the grand jury?

MR. BERGER: Because I spoke to Miss Gennaro after Wymbs testified and I asked her about Power and asked her whether she would tell me anything about Indecon andTo mW ard. I am not representing Miss Gennaro in a civil action on Tom Ward and Indecon, so I do have communication with her. She has always told me she had no relationship, she didn't know Rodman's activities in Power Conversion from May '72 through October '72. That is what she told me.

I didn't know what she allegedly told Mr. Lowe prior to a few days ago.

THE COURT: Let me ask you this. On May 27, when Mr. Lowe wrote you this letter, were you representing Miss Gennaro at that time?

MR. BERGER: As to Indecon and Tom Ward, your

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Honor, yes, I was.

THE COURT: And she testified before the grand jury on June 10th?

MR. BERGER: At that time I was not representing her. I had withdrawn. I don't know what she says, your Honor, but I had withdrawn. I didn't go to the grand jury with her.

THE COURT: That was a short time later.

MR.BERGER: That's right. In response to the letter I withdrew, your Honor.

THE COURT: But you are now representing her in some other matter, is that it?

MR. BERGER: In a civil matter that she was severed with a couple of weeks ago on Tom Ward and Indecon. I think that Miss Gennaro -- when I left the case, I think that she became -- Marty Hecht became her attorney, if I remember. I believe that was her attorney.

MR. LOWE: At what time --

THE COURT: Just a minute, Mr. Lowe. Don't interrupt.

MR. BERGER: I believe her attorneyd uring Power Conversion was Marty Hecht, not me.

THE COURT: During Power Conversion?

MR. BERGER: In other words, if she went before

the U. S.Attorney's office, which she tells me she did on Power Conversion, she had an attorney. His name is Martin Hecht.

THE COURT: When did she tell you that?

MR. BERGER: I think that on Power Conversion, your Honor, I told her that I could not go withher at all because there was a conflict.

THE COURT: When was that?

MR. BERGER: I don't recall. Whenever Power Conversion was.

THE COURT: What do you mean whenever --

MR.B ERGER: Whenever she went down to the U. S. Attorney's office.

THE COURT: When did she go down, Mr. Lowe?

MR. LOWE: Your Honor, I don't have the record of the date on which she appeared. It was not a formal appearance. It was an informal conference and there is no record of her appearance at that time.

THE COURT: Approximately. Was it this year?

MR. LOWE: Your Honor, Mr. Shaeffer advises me that Mr. Hecht represented Miss Gennaro before the Securities and Exchange Commission in approximately mid-1973. She gave no testimony before the SEC. It is my recollection, your Honor, and I am not really certain of the date, but

as I recall, this trial was originally scheduled for March of this year.

THE COURT: Yes, it was.

MR. LOWE: That leads me to believe that I must have spoken with Miss Gennaro in January or February of this year. I know this, I spoke to Miss Gennaro after I spoke to Mr. Wymbs, and we do have some record of that. That was in March that I spoke to Mr. Wymbs, so it will have to be after the time I spoke to Mr. Wymbs because it was what Mr. Wymbs said to me that led me to seek Miss Gennaro to determine what she had said as to what Mr. Wymbs had said.

That indicates to me it would have had to have been not earlier than March and I suspect not later than April of this year that I spoke to Miss Gennaro on this subject.

I think, your Honor, basically, based on --

THE COURT: Let's not interrupt, Mr. Lowe.

MR. LOWE: I am sorry, your Honor.

THE COURT: Mr.Berger, according to Mr. Lowe, Miss Gennaro came in to see him maybe some time in March when this case was originally scheduled. On May 27, which is after that date,you were representing Miss Gennaro?

MR. BERGER: Yes, your Honor.

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THE COURT: So that after she went to the U. S. Attorney's office you were her attorney, so as the U.S. Attorney points out in his memorandum, the question is whether this was evidence about which you had the essential facts, or were on notice. You knew that she had gone to the U. S. Attorney's office to talk about Power Conversion.

MR. BERGER: I didn't represent her whens he went there with Power Conversion, because of the conflict. I believe --

THE COURT: The issue is whether, according to Mr. Luigi Arocase, you had notice of the essential facts?

MR. BERGER: Your Honor, because of the conflict I doubt whether I would have asked her any questions about what she said to the U. S. Attorney on Power. I didn't go with her on Power, because I didn't want to be involved in an obvious conflict. When I found out there was an obvious conflict on Indecon and Tom Ward before the U. S. Attorney, I left --

THE COURT: It is claimed, Mr. Berger, that you were representing Miss Gennaro on May 27th at a time when you were representing Mr. Rodman. That is undisputed.

MR. BERGER: I am not disputing that.

THE COURT: So you were representing Mr. Rodman

on May 27th of this year and you were also representing Miss Gennaro whom you said was a friend of his, whom you knew had been called to the U. S. Attorney's office.

So the issue is whether the Government suppressed any evidence that might be exculpatory to the defendant.

The next issue is whether you had any notice of the possible existence of any such exculpatory evidence and the answer to that must be yes, since you knew that this woman had been called down, she was a friend of Mr. Rodman, had been involved in other matters about which she was being called to testify, andyou were representing both of them.

Now to say that the Government suppressed evidence she might have given, this can't be. That is not the purpose of the Brady rule.

MR. BERGER: Your Honor, all I am saying is this: Number 1, I represented Miss Gennaro with regard to a specific case. One specific case. And, that was the Indecon, Ward matter. I represented her for about five days. I didn't get into any other matters at that time.

THE COURT: We are going to interrupt this discussion to take up a note from the jurors which will be marked Court Exhibit 1.

(Court Exhibit 1 marked.)

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THE COURT: The note reads: "Please provide us with (1), a list of all witnesses. (2), a list of all exhibits; (3), Mr. Umbogy's spelling. (4) photocopy of the Value Line article of 9/29/72, for an explanation of the significance" -- with an asterisks over that word -- "of Mr. Rodman's signature on Mr. Aiken's stock certificates, and the stock certificates entered into evidence; (5) The original of theValue Line article." And the asertisk: I see now refers to something written at the bottom of the page: "Is the stock negotiable as is or does it require additional signatures?"

There was testimony to that effect, so we will have to tell the jurors of that.

MR. BERGER: Both ways, your Honor, testimony both ways.

THE COURT: Now, with respect to a list of witnesses, I don't know whether you have that, do you?

MR. LOWE: I don't exactly have it, but I could make one quickly by hand if that would be satisfactory.

THE COURT: Any objection to the jurors having a list of witnesses?

MR. ENTIN: No objection.

MR. BERGER: No objection.

THE COURT: A list of all exhibits. Do you

have that?

MR. LOWE: I have a list that I can make shortly of the Government exhibits, but not the defense --

MR. ENTIN: I can make a list of the defense exhibits.

THE COURT: Do you have any exhibits, Mr. Berger?

MR. BERGER: No exhibits.

THE COURT: Any objection to the jurors having a list of exhibits?

All right, there being none, we will send in a list of exhibits.

Now, Mr. Umbogy's photocopy of the Value Line article, I assume you have that.

MR. LOWE: Yes, your Honor, that is Government Exhibit 10A.

THE COURT: And then the original of the article, is that in evidence?

MR. LOWE: That is Government Exhibit 1E, your Honor.

THE COURT: And then with respect to the explanation of the significance of Mr. Rodman's signature on Mr. Aiken's stock certificates and the stock certificates entered into evidence, I guess they want the stock certificates entered into evidence. That is the way it seems to

read. "Explanation of the significance of Mr. Rodman's signature on Mr. Aiken's stockc ertificates and the stock certificates entered into evidence."

So, we have to get the stock certificates.

MR. LOWE: That is Government Exhibit 1B, your Honor.

THE COURT: Now, with respect to the first part of that, an explanation of the significance and the asterisk which reads "Is the stock negotiable as is or does it require additional signatures" -- I recall a question to Mr. Lindsay, was it --

MR. LOWE: I believe it was Mr. Orenstein's testimony, your Honor.

MR. BERGER: And Mr. Aiken's, both. They both testified.

THE COURT: What did Mr. Aiken say?

MR. BERGER: Mr. Aiken said it was completely negotiable in its present form. Mr. Orenstein says the bank would have to stamp the signature of C.I. Oren to complete the negotiability of the instrument. So, it is both ways.

MR. LOWE: Your Honor, I suggest that between us we could pick out the relevant portions of Mr. Aiken's and Mr. Orenstein's and have them read to the jury. I

don't see that there is any other way to explain it other than to have the testimony.

MR. BERGER: May I hear the question again, your Honor?

THE COURT: Why don't you just look at it.

MR. BERGER: I don't think the Court can at this time instruct the jury as to the significance of Mr. Rodman's signature. They have had to gather that through the trial by the evid ence as it came in.

THE COURT: They are not asking that, really, or the Government is not insisting on an explanation. What he suggests is we read the testimony from those two witnesses as to that, Aiken and Orenstein.

MR. BERGER: Your Honor, what I suggest is that at this time perhaps we just give them the certificates, and give them the other items they ask for and see if they come back again and ask for a further explanation.

THE COURT: I think what we will do is give them the items they have asked for. We have got them now. You have a list of witnesses, and a list of exhibits and Mr. Entin will get a list of his.

MR. ENTIN: Your Honor, two of my exhibits were given to the court reporter and haven't been returned to me.

I have them now.

THE COURT: We will mark this note 2. We have a previous Court Exhibit 1. This will be Court Exhibit 2.

xxx (Court Exhibit 2 marked.)

THE COURT: During the luncheon recess the reporter can find the testimony of Mr. Aiken or Mr. Lowe --

MR. LOWE: We have the transcripts, your Honor.

THE COURT: All right, Mr. Lowe, you will find it and the testimony of Mr. Orenstein as to that and the report will will bring up the notes which he has from the other reporter regarding what transpired at the bench with respect to who is local counsel in this case.

We are going to recess now until twoo 'clock for lunch.

Which items are we sending in now?

MR. LOWE: Your Honor, we have available to go right now Government Exhibit 1B, 1E and 10A.

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THE COURT: All right.

MR. LOWE: Well --

THE COURT: You can get those up during the lunch hour and then we will continue discussion on this Brady matter after lunch.

(Luncheon recess.)

AFTERNOON SESSION

(2:05 p.m.)

(Jury not present.)

THE COURT: I believe when we recessed you were to find certain testimony, Mr. Lowe, by Mr. Aiken.

MR. LOWE: Yes, your Honor.

Your Honor, Mr. Berger and I agree that the testimony of Eric Aiken beginning at page 310, line 19, and going through page 312, line 2, should be read to the jury in this connection, and that the testimony of Irving Orenstein beginning at 671, line 24, through page 672, line 25, should be read to the jury.

THE COURT: All right, have those marked so the reporter can read those.

I have another note from the jury which will be marked Court's Exhibit 3 which reads as follows:

"Please provide us with a copy of the transcripts (all). Thank you. If not, please provide us with the transcripts of Mr. Constantinou."

And of course I'll tell the jurors that we can read back any portion of the testimony they desire to have read back.

MR. LOWE: Your Honor, in connection with

marking that exhibit it should be Court's Exhibit 4 because we have marked Court's Exhibit 3 the list of witnesses and list of exhibits the jury requested and sent in to the jury in your Honor's absence.

THE COURT: All right.

(Court's Exhibit 3 and Court's Exhibit 4 marked.)

THE COURT: If you will bring in the jury we will read the portion of the transcript we have just referred to.

We have another note from the jury which says:

"Please provide the company names associated with witnesses 5, 6, 7, 8, 9 and 10, and the positions each witness held within their respective company."

(Court's Exhibit 5 marked.)

(Jury present.)

THE COURT: Ladies and gentlemen, I have three notes from you which we will take up.

The first one reads as follows:

"Please provide us with, one, a list of all witnesses; two, a list of all exhibits; three, Mr. Umbogy's photocopy of the Value Line article of 9/22/73; four, an explanation of the significance of Mr. Rodman's

signature on Mr. Aiken's stock certificates, and the stock certificates entered into evidence; five, the original of the Value Line article."

We have sent you in a list of the witnesses and exhibits.

THE FOREMAN: Yes.

THE COURT: And you got Mr. Umbogy's copy of the Value Line article.

THE FOREMAN: Yes.

THE COURT: And you got the stock certificates entered into evidence.

THE FOREMAN: Yes.

THE COURT: And you got the original of the Value Line article.

THE FOREMAN: Yes.

THE COURT: With respect to the other matter, that is, an explanation of the significance of Mr. Rodman's signature on Mr. Aiken's stock certificate, there is an asterisk and the asterisk reads:

""Is the stock negotiable as is or does it require additional signatures?"

Now, with respect to that, there were two witnesses who testified as to that matter. One was Mr. Aiken and the other was Mr. Orenstein, and we have

found those portions of the testimony which will now be read to you by the court reporter.

(Record read as indicated.)

THE COURT: With respect to the second note, it reads:

"Please provide us with a copy of the transcripts (all)."

We cannot provide you with a copy of all the testimony in the case because that is interspersed with side-bar conferences.

Then you say:

"If not, please provide us with the transcript of Mr. Constantinou."

As I told you at the end of the charge, if you want the testimony of any witness read back, we can do it as we have just done here, so when you go back to the jury room send out a note and if you want the testimony of Mr. Constantinou or anyone else, a portion of it read back.

With respect to the next note, which has been marked Court's Exhibit 5, it reads as follows:

"Please provide us with the company names associated with witnesses 5, 6, 7, 8, 9 and 10 and the positions each witness held within their respective

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companies."

What we will have to do is go through the record and read to you the testimony of each witness with respect to that.

So if you will return to the jury room now, we will have the lawyers go through it and try to find that information in the testimony and have it read back to you.

(The jury left the courtroom to resume its deliberations.)

THE COURT: Now, are you able to have your assistant find that information?

MR. LOWE: Your Honor, I know what it is. It is apparently the witnesses starting with Mr. Murray from Value Line and then the people who came in to testify that their company subscribed to Value Line. Those are the ones that the jury is referring to, your Honor.

I was going to suggest that we could perhaps, instead of having to read that, we could go through the transcript and pick out what they said about what their job was at their particular company and make another list and give them a list. That might save some time, unless counsel object to that procedure.

MR. ENTIN: I see no problem with that.

MR. BERGER: All right.

THE COURT: Let your assistant continue that while we continue with this.

I think when we recessed, Mr. Berger, we had established that you represented both the defendant Rodman and Miss Gennaro on May 27th.

MR. BERGER: Correct.

Your Honor, may I make one point clear, though. I don't want it to appear that I'm raising the issue of intention of suppression of evidemce. That's not my intent. If your Honor recalls, I did not raise this issue until after Mr. Lowe made certain statements during his rebuttal in closing argument. So my intention is not to accuse the government of intentional suppression of evidence. All I am simply saying is that I objected to Mr. Lowe stating to the jury that Rodman could have brought in Darnice Gennaro as a witness to disprove the testimony of Mr. Wymbs.

That was what got me up.

THE COURT: I think the record may reflect you made a motion for mistrial.

MR. BERGER: With regard to that, your Honor.

THE COURT: You said Brady.

MR. BERGER: Not at that time, your Honor. At that time I said that Mr. Lowe had raised the issue of the defendant's --

THE COURT: We spent some time this morning on it. The first time you were talking about the government mentioning that you could have called a witness.

MR. BERGER: That's what raised the issue, your Honor. Brady --

THE COURT: Are you withdrawing your Brady objection?

MR. BERGER: I am not arguing the Brady objection. Mr. Entin is arguing the Brady objection.

THE COURT: This is the first time you have made that clear, Mr. Berger.

MR. BERGER: My objection is on the record, your Honor. I state simply I may have called her as a witness if I would have known there was exculpatory material at the U. S. Attorney's Office and I would not be hit with a prior inconsistent statement. I wasn't looking at it as Brady material. Mr. Entin was. My objection, my initial objection, was that Mr. Lowe told the jury that Rodman or the defense could have

called this particular witness, and that an inference was created against the defendant by failing to call that witness and that there was a burden on the part of the government to produce witnesses. That's why I borught in my amended request for instruction No. 33. I didn't even think of Brady until way after my objection.

THE COURT: The question now is whether you are withdrawing any Brady objection.

MR. BERGER: I am not withdrawing any objection, your Honor. I don't know how sound it is. I know that I was the attorney at one time for both parties. I was the attorney for Gennaro with regard to one case; I was the attorney for Mr. Rodman with regard to that same case. I was never the attorney for both with regaid to the Power Conversion case.

I am just stating for the record those are the facts as I recail them. What the law may be, what the government was obligated to do, I have made no decision in my mind.

THE COURT: In any event, you made no demand which the government suppressed?

MR. BERGER: There is no suppression as far as my client is concerned.

THE COURT: You don't have any Brady claim.

Do you have a Brady claim, Mr. Entin, or are you on some other point?

MR. ENTIN: No, your Honor, I'm not on another point. I do have a legitimate Brady claim in this particular matter.

THE COURT: Did you make the demand on the government after Mr. Wymbs testified or before he testified?

MR. ENTIN: Your Honor, I made demand on the government for Brady material with my initial motion.

THE COURT: That's insufficient, as I ruled at the time.

You have to make a demand for something specific. There is no obligation on the government to turn over to you anything which might possibly be exculpatory to the defendant by your coming in and saying Brady. The courts have ruled that repeatedly.

MR. ENTIN: Your Honor, we asked specifically.

THE COURT: For this testimony?

MR. ENTIN: How can I ask for testimony I had no idea existed.

THE COURT: That's the point. On the trial you claim that you learned the first time that Mr. Wymbs would testify as he did, that Mr. Zammas was present, is that it?

MR. ENTIN: I didn't claim that, your Honor. I indicated that and I would suggest that that's the truth. Obviously, the government does not have to give me its list of witnesses beforehand. The first time I had ever heard of Mr. Wymbs was when Mr. Wymbs got up to testify. The first time I ever heard anything about this meeting --

THE COURT: When you heard that, did you make any demand on the government?

MR. ENTIN: A specific demand on the government?

THE COURT: When you heard that testimony.

MR. ENTIN: Yes, your Honor. Go ahead.

THE COURT: Did you?

MR. ENTIN: Did I go to Mr. Lowe and say, "Mr. Lowe, can I please have any Brady material which you may have"? No.

THE COURT: As to this matter, this Miss Gennaro.

MR. ENTIN: No, your Honor, I did not,

because my understanding was with Mr. Lowe, that he would provide me with Brady material as applied, and, as a matter of fact, in the course of this case Mr. Lowe has provided me with Brady material. I didn't go to him after the testimony and say, "Please provide me with Brady material with regard to Miss Gennaro." I think Mr. Loew knew that if he had Brady material, I would like same.

THE COURT: Is that right, Mr. Lowe? Do you have some understanding with Mr. Entin?

MR. LOWE: Your Honor, my understanding was simply that I would turn over whatever the government was obligated to turn over, and I did exactly that, your Honor.

My position is simply this: Miss Gennaro -- first of all, there is no testimony or any written record of anything. That is a fact. So there was nothing physically to turn over. The only thing that could have been turned over was knowledge that was in my head of what Miss Gennaro had told me.

Now, it seems to me, your Honor, when this whole business of Brady in this particular instance -- when Mr. Wymbs testified that Mr. Zammas and Miss Gennaro were together and something happened, Mr. Entin is thereupon

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on notice that Miss Gennaro may have knowledge relevant to the case, either to support or contradict the government's witness.

Mr. Zammas was very friendly with Miss Gennaro when they were dealing together. Mr. Zammas could very well advise his lawyer whether or not he believed Mr. Wymbs was telling the truth or lying or whether or ont Darnice Gennaro might be useful.

It seems to me that what Mr. Entin is suggesting that I should do is a job for him; rather than letting him on his own to find out what Miss Gennaro has to say, tell him. I don't think we have to do that. What we have to do is, if we know a witness whose existence is not known, for example, the classic case where there is a shooting and there are three eyewitnesses, two are called by the government in the prosecution, the third is not only not called but not known to anyone except the government, and it is known that his description perhaps, or whatever, of the person on trial grossly conflicts, for example, with the person who is actually on trial. That kind of thing is what Brady is aimed at, your Honor. It is not aimed at turning the government's prosecutor into a defense attorney investigator. We are supposed

to tell them what they could not find out on their own basically.

THE COURT: Yes. The court agrees.

MR. ENTIN: May I respond, your Honor?

THE COURT: Yes.

MR. ENTIN: Mr. Lowe, your Honor, cites in his memorandum the following:

"It is to assure the defendant that he will not be denied access to exculpatory evidence known to the government but unknown to him."

There is no way, even if the name Darnice Gennaro came out in the middle of Mr. Wymbs' testimony, that we would have any knowledge that the government was aware of exculpatory evidence, which is that Miss Gennaro wasn't there. The government provided us with a name during that particular testimony --

THE COURT: Yes, but as Mr. Lowe points out, your client would have been aware whether Miss Gennaro was there or not as testified to by the witness, and all that is required is that you have notice of this. You knew by the testimony of Wymbs that here was somebody who might or might not have exculpatory material. The government wasn't required to tell you what she said but, as Mr. Lowe points out, it says you should not be

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denied access to exculpatory material and you have not been by the government's action.

MR. ENTIN: Assuming arguendo your Honor is 100 per cent correct and we were given a name, Miss Gennaro, the government at that point should have given us an address at least. Proffer to the court Mr. Zammas has not seen this witness or individual for over two and a half years. Mr. Lowe, if the testimony would be exculpatory, at least should have given me an address where I could get in touch with the person.

THE COURT: No, he didn't have an obligation. Any motion that you are making for a mistrial, based on Brady, is denied.

MR. ENTIN: Your Honor, at this point I would indicate to the court that I have reserved certain motions for the purpose of making it after the jury was charged. Initially during Mr. Lowe's closing you denied my motion to strike references to Casa Bella and nondisclosure in Casa Bella based upon my argument it was not in evidence and there was no testimony as to nondisclosure with regard to Casa Bella. Your Honor at that time denied my motion to strike.

At this point I would move for a mistrial

on that.

THE COURT: Denied.

Do you need a few more minutes, Mr. Lowe?

MR. LOWE: Apparently Mr. Shaeffer needs a few more minutes.

THE COURT: All right.

Do you have that other information, Mr. Reporter, that I asked you about earlier?

(Handed to the court.)

THE COURT: Also on this point about Brady, do you recall, Mr. Entin, that I recollected that you had said, during the jury selection process, that Mr.Berger was local counsel? The reporter has found that. Your statement was:

"We don't need local counsel, your Honor. We are moved for purposes of just trying this case. Mr. Berger is local counsel."

And I said:

"Mr. Berger knows better. Let's proceed."

We are talking about whether you had waived any challenges by not making them as your turn came. You said you relied on Mr. Berger's representation.

MR. ENTIN: I recall that.

THE COURT: So it was your statement

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that Mr. Berger was local counsel.

All right, let's proceed and bring the jury back for this information, or do you still need more time?

MR. LOWE: No, your Honor, we have it.

THE COURT: Show it to the defendants.

MR. LOWE: I was going to suggest, your Honor, we mark it as a court exhibit and have the marshal give it to them without bring them back, unless --

MR. ENTIN: Your Honor, defendant Zammas has no objection to this.

MR. BERGER: Defendant Rodman has no objection.

THE COURT: Would you bring in the jury, Mr. Clark.

(Jury present.)

(Court's Exhibit 6 was marked.)

THE COURT: Ladies and gentlemen, we have culled from the record the information which you wanted by your note marked Court's Exhibit 5, and that is:

"Please provide the company names associated with the witnesses 5, 6, 7, 8, 9 and 10, and the positions each witness held within their respective company."

And that compilation has been marked Court's Exhibit 6, which I will read to you:

Hugo Heuermann, securities analyst, Chemical Bank, witness 5.

No. 6, Bess J. Mersten, assistant treasurer, Monarch Insurance Company, Ohio.

7, Josefina Arencibia, assistant department head of the investment library, First National City Bank.

8, Theodore Bottino, assistant vice president in charge of office services of E. F. Hutton & Company.

9, Bernard Jaffe, Jr., partner of Loeb, Rhoades & Company, who runs the uptown division of Loeb, Rhoades & Company.

10, Elena J. Frevola, assistant vice president in the investment department of New York Life Insurance Company.

You may return to the jury room.

(The jury left the courtroom to resume its deliberations.)

THE COURT: We are going to recess on this case for a few moments. I have another matter.

MR. LOWE: May I ask the court whether the court would object to my returning to my office?

THE COURT: Yes, because the jurors may send out another note. Remain on this floor so we don't have to run around the courthouse or go call to the next building.

Gentlemen, remain on this floor.

(Recess.)

THE COURT: We have another note from the jurors which will be marked Exhibit 7 and it reads as follows:

"Please provide us with Exhibits 17, 18 and I," it looks like.

Do you have those?

MR. LOWE: Your Honor.

THE COURT: Let the clerk give them to the marshal, and mark this.

(Court's Exhibit 7 marked.)

(In open court; 6:10 P.M.)

THE COURT: We have several notes, gentlemen, from the jurors, only one of which relates to the case, which reads as follows:

"Please provide us with Mr. Aiken's testimony regarding the stock override and the payment of $1000 and the 900 shares of Power Conversion he received from Mr. Zammas."

And the others relate to telephone calls to be made. One juror says he has a car parked at Newbold Avenue, half a block north of the Cross Bronx Expressway. Parking is not permitted on Monday and Thursday from about 11:00 to 2:00 P.M. He must mean 11:00 to 2:00 A.M. He wishes to move the car if they have to stay overnight together. One says, please provide more envelopes, and another please call a certain number and leave this message for me in Room 204, that Martha is delayed and please start the meeting and please take notes. Thank you, Martha Nayphe.

And, "please call this number, I will be late."

Gentlemen, what I thought I would do is to probably let the jurors go home 6:30 and come back tomorrow. They will have been deliberating then six and a half hours, or, we could possibly let them go to dinner at 7:00 o'clock. It is probably too late to make arrangements.

It seems to me probably after six and a half hours it might be wise to let them go home. I will hear any views you might have.

MR.ENTIN: Your Honor, on behalf of defendant Zammas, we would have no objection to letting them go. Six and a half hours is a lot of deliberation.

MR. BERGER: On behalf of defendant Rodman we would prefer they be let go home.

Six and a half hours is a long day.

MR. LOWE: Your Honor, it seems to me the jury has not made any indication they are anxious to go home. They have asked to hear some testimony and phone calls be made so people know they are delayed, and it seems to me they are almost anticipating being here, and that seems to me that they feel what they are doing in there is accomplishing something, and I think that leads me to believe that they should be allowed to continue tonight in order to accomplish something.

THE COURT: Mr. Clerk, will you check with the marshal to see if it is too late to make arrangements for them to go to dinner at 7:15.

MR. ENTIN: Your Honor, if we are speculating --

THE COURT: I just want the marshal, if it is

possible, and usually you have to make arrangements by six o'clock.

In the meantime, you can find the testimony of Mr. Aiken.

MR. BERGER: Your Honor, the testimony is in the direct and in the cross.

THE COURT: Yes.

THE MARSHAL: We can probably get some kind of an arrangement.

THE COURT: Check on whether we can get a limousine. Make the call. Make it for 7:15 or 7:00.

MR. ENTIN: Could your Honor read the question again, please?

THE COURT: You can look at the note if you would like. Mark that note Court Exhibit 8.

(Court Exhibit 8 marked.)

THE COURT: And these other telephone calls, I will give those to the marshal.

MR. LOWE: I found the direct, your Honor.

THE COURT: How long is it?

MR. LOWE: I believe it is approximately four pages, your Honor, or less. I have page 184, line 19, through page 187, line 7. Page 188, line 16, through page 189, line 15 and page 189, line 24 through 190,

line 9.

THE COURT: Do you have the cross, Mr.Berger?

MR. BERGER: I am working on that, your Honor. So far I found something on 307 through 310.

THE COURT: Have you found it, Mr. Entin?

MR. ENTIN: Your Honor, it is difficult. Does your Honor think we should pull totally out of context any reference to these three items or keep them in the context of how they werre being testified to?

THE COURT: We have to give the jurors what they ask for. They want any testimony relating to that subject.

MR.ENTIN: I would assume it should be in context.

THE COURT: You mean all questions relating up to that on other matters?

MR. ENTIN: I am not saying on other matters, your Honor. I have a very lengthy colloquy starting at 256.

THE COURT: Colloquy?

MR.ENTIN: Areas of testimony, that discuss the meeting of September 14, which was the Italian restaurant meeting at which all these things were discussed and while each individual question may not specifically relate to

one of the three areas as a whole, the whole thing relates to that meeting.

THE COURT: No. We don't need anything except his testimony as to the payment.

It says, "Please provide us with Mr. Aiken's testimony regarding the stock override." That is one.

Are you listening or talking while I am talking to you?

"Please provide us with Mr. Aiken's testimony regarding the stock override."

Anything he said about the override should be read to the jury. And, the payment of $1000, anything he said about that should be read to the jury. And, the 900 shares of Power Conversion. Those are three items. So we don't need any intervening colloquy about other matters, obviously.

MR. LOWE: Your Honor, I believe we have agreed that the following portions of the testimony of Mr. Aiken should be read to thejury in response to their most recent request. Page 184, line 19 through page 187, line 23. Page 188, line 16, through page 189, line 15. Page 189, line 24 through page 190, line 9. Page 256, line 12, through page 257, line 22. Page 259, lines 12 through 20. Page 260, line 9, through page 264, line 1,

page 312, lines three through 8.

THE COURT: All right, bring in the jurors.

Will you have the pages marked so the reporter can read them readily.

MR. LOWE: Yes, your Honor.

(Jury present.)

THE COURT: Ladies and gentlemen, I have your note, which has been marked Court Exhibit 8, which reads as follows:

"Please provide us with Mr. Aiken's testimony regarding the stock override, and the payment of $1000, and the 900 shares of Power Conversion received from Mr.Zammas."

And the lawyers have now found that testimony and it will be read to you.

After the reading of that testimony, you will go to dinner, and then at 10:30, we have arranged for transportation to take you home and you will not be staying overnight.

We have a message for Mr. Goldstein regarding his car being parked there tomorrow, is that it? You won't be staying overnight so there won't be any problems.

With respect to the other notes requesting a call be made, there are two others, the marshall can make those calls. And, the clerk can give you additional envelopes that you have requested.

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Are you ready to read the testimony, Mr. Reporter?

(Record read.)

THE COURT: Ladies and gentlemen, you will go to dinner now. Arrangements have been made and then you will come back and resume your deliberations. At 11:00 o'clock the buses will take you to your homes.

You are excused now.

(Jury left the courtroom.)

THE COURT: Mr. Marshal, you ca- now make these calls.

MR. ENTIN: Your Honor, what time --

THE COURT: You can go out now until about 8:30 or so.

MR. LOWE: Your Honor, just to make a point, the marshal advises me the jury is dining at Aldo's --

THE COURT: Dont go to Aldo's. Go anywhere else.

(Recess to 7:55 P.M.)

(Time noted 10:15 P.M.)

xxx (Court Exhibit 9 marked.)

Jury requested Government Exhibit 16, 16A and 16B. Delivered to jury with approval of all counsel, in the absence of the Court.

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THE CLERK: Judge Motley instructed me as the clerk of the Court to have the jury suspend deliberations at 11:25, and resume deliberations tomorrow morning at ten o'clock.

(11:25 P.M.)

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United States of America

vs. 74 Cr. 987

William Eric Aiken, et al

New York, New York.
August 7, 1975 - 10:13 A.M.

(In the absence of the Court.)

THE CLERK: The jury was instructed to continue deliberations.

(Recess.)

(Time noted 12:00 noon.)

THE COURT: We have a note from the jurors which will be marked Court Exhibit 10, which reads as follows:

"May we please hear the testimony leading up to and through the first meeting that was held at La Fortuna attended by Zammas, Aiken and Perlmutter."

Gentlemen, have you had a chance to find that?

MR. LOWE: I think we found just about all of it, your Honor. We haven't had a chance to review what we all found, but we are almost finished. It should take us just a few more minutes.

THE COURT: I have another note which will be marked Court Exhibit 11, which came in the same envelope which reads as follows:

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"Please clarify: (1) Is the verdict to be rendered(on each defendant)on Counts 1 through 12 separately; (2) Is the verdict to be rendered (on each defendant) on Counts 1 through 6 collectively and Counts 7 through 12 collectively?"

Of course the answer to the first question is yes. That is, the verdict is to be rendered on each defendant on counts 1 through 12 separately.

So, as soon as you have found the testimony, we will have the jurors come in.

xxx

(Court Exhibits 10 and 11 marked.)

(Recess.)

THE COURT: Gentlemen, do you think you will find this soon? We have another matter to take up.

MR. LOWE: We are almost at the very end, your Honor.

(Recess.)

THE COURT: We are going to recess in this case until 2:15, for lunch. I have another matter on the luncheon hour, gentlemen.

MR.ENTIN: Your Honor, will there be any indication given to the jury their request has been noted and it will be after lunch?

THE COURT: Yes. How long will this testimony

MR. ENTIN: Probably an hour, your Honor.

THE COURT: All right, bring them in. The jurors' lunch has been ordered.

(Jury present.)

THE COURT: Good afternoon, ladies and gentlemen.

I have your notes, the first of which has been marked Court Exhibit 10, which reads as follows:

"May we please hear the testimony leading up to and through the first meeting that was held at La Fortuna attended by Zammas, Aiken and Perlmutter."

It has taken some time to find that testimony, and it is now a quarter to 1:00, which is the usual lunch hour, and so we will have to wait until after lunch to read that to you because it will take a while to read it.

Now, with respect to your second note which has been marked Court Exhibit 11, which reads as follows:

"Please clarify (1) is the verdict to be rendered on each defendant on Counts 1 through 12 separately."

The answer to that is yes.

The second question was: "Is the verdict to be rendered on each defendant on Counts 1 through 6 collectively, and Counts 7 through 12 collectively."

That is not quite clear to me, but the answer to the first question is yes.

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Each count must be considered separately and a verdict returned separately as to each count as to each defendant separately.

I think your lunch has been ordred, and it will be here shortly.

You will have lunch and after lunch we will read the testimony that you want read back.

You may return to the jury room.

(Luncheon recess; 12:50 P.M.)

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AFTERNOON SESSION

(2:50 p.m.)

(In open court; jury present.)

THE COURT: Is the reporter ready to read the transcript at this point?

MR. LOWE: Before that, your Honor, may I read for the record at what pages and lines he will be reading?

THE COURT: Yes.

MR. LOWE: From the direct testimony of Stanley Perlmutter, page 62, line 24, through page 63, line 19; page 66, line 5, through page 67, line 6; page 69, lines 9 through 11; page 69, line 18, through page 73, lin3 5.

From the cross examination of Stanley Perlmutter, page 121, line 18, through page page 123, line 12; page 129, line 12, through 131, line 20; page 132, line 4, through 134, line 13; page 146, line 14, through page 137, line 14; page 139, line 5, through page 142, line 17; page 143, line 5, through page 145, line 15.

From the direct testimony of Mr. Aiken, page 168, line 10, through page 169, line 18; page 179, lines 6 through 12; page 181, lines 4 through 6; page 182,

line 22, through page 187, line 23.

From the cross examination of Mr. Aiken, page 241, line 7, through page 243, line 18; page 245, line 20, through page 249, line 2; page 252, line 18, through page 253, line 22; page 254, line 18, through page 255, line 12; page 256, line 1, through page 259, line 20; page 264, line 3, through page 266, line 22; page 270, line 8 through line 20; page 271, line 8 through line 21; page 307, line 6,through page 309, line 2.

From the redirect examination of Mr. Aiken, page 325, lines 4 through 13.

(Record read as above indicated.)

THE COURT: Thank you.

The jury will return to the jury room.

(The jury left the courtroom to resume its deliberations.

THE COURT: We have a note from the jurors, which will be marked Court's Exhibit 12, which reads as follows:

"Judge: Your Honor, we have reached a unanimous decision with respect to one of the two defendants. However, we are 'deadlocked' with respect to the other defendant.

"Thank you. Jury."

Then we have a note from another juror asking that a call be made concening a ticket for tonight.

There is another note coming.

Give this ticket back to the marshal with this note the juror has written to call someone. She wants the ticket back.

Here is another request. The same juror wants another call made. Give that to the marshal, Mr. Clerk.

Gentlemen, I have read you Court's Exhibit 12, the jury has reached a unanimous verdict with respect to one and is deadlocked as to the other. Is there some comment from either side.

MR. LOWE: Your Honor, I assume that everyone would be interested in knowing what the unanimous verdict as to one defendant is.

THE COURT: Ask the marshal to bring in the jury.

(Jury present.)

THE COURT: Ladies and gentlemen, we have your note, which has been marked Court's Exhibit 12, which reads as follows:

"We have reached a unanimous decision with

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respect to one of the two defendants. However, we are'deadlocked'with respect to the other defendant."

And at this time we will receive your unanimous decision with respect to one defendant.

(Jury roll called; all jurors present.)

THE CLERK: Madam Forelady, have you agreed upon a verdict as to William Rodman on count 1?

THE COURT: Just a minute. Which defendant have you reached a verdict as to?

THE FORELADY: Thomas Zammas.

THE COURT: You have reached a unanimous verdict as to Thomas Zammas?

THE FORELADY: Yes.

THE COURT: On all counts?

THE FORELADY: All 12 counts.

THE COURT: Do you want to announce the verdict?

THE FORELADY: We, the jury, find Thomas Zammas guilty on all 12 counts.

(The jury was polled, and to the question "Is that your verdict?" all answered in the affirmative.)

THE CLERK: Members of the jury, listen to your verdict as it stands recorded. You say you find the defendant Zammas guilty on counts 1 through 12,

and so say you all.

THE COURT: Now, Madam Forelady, I am going to ask you a question and I want you to answer only yes or no when I ask it and just stop and think a minute and make sure you have heard the question. If you haven't heard it, I will repeat it. So when you answer the question, answer only yes or no. Do you understand?

THE FORELADY: Yes.

THE COURT: Your note says that you are deadlocked with respect to the other defendant. The question is, do you think that with additional time the jury might come to a unanimous verdict as to Mr. Rodman?

THE FORELADY: No, your Honor. No.

THE COURT: All right, you may return to the jury room for the moment.

(The jury left the courtroom.)

THE COURT: The jurors have indicated that they are deadlocked with respect to the defendant Rodman, and the forelady has answered that she believes even with additional time they would not be able to arrive at a unanimous verdict. Do you have anything to say, Mr. Berger?

MR. BERGER: Your Honor, the trial was not

that long. I think the jury has been out close to 20 hours, approximately. I feel they have been a very conscientious jury. They listened to the facts in this case. I believe if they could not find the defendant guilty beyond a reasonable doubt, the period of time that has elapsed shows the existence of the reasonable doubt, I don't believe that additional time in the jury room, additional deliberation will result in a verdict.

THE COURT: Do you have anything to say, Mr. Lowe?

MR. LOWE: May I have just a moment to think, your Honor.

Your Honor, I wonder if Mr. Berger has a motion at this point.

MR. BERGER: Your Honor, at this point I would move that the jury be found to be in hopeless deadlock and hung.

MR. LOWE: Your Honor, I don't think the government can in good faith oppose that application.

THE COURT: All right.

The jury went out yesterday at 12 o'clock, ate lunch in the jury room, and continued their deliberations until 10 minutes to 7, when they went to dinner, and

returned at 8:30, and the deliberated until 11:25.

They started this morning about 10:10, is that right, Mr. Clerk?

THE CLERK: That's right, that's correct.

THE COURT: They had lunch in again today, and it is now 5 o'clock when they came in.

I think the trial was just a little more to four days of actual trial. And the jury has sent out a note saying it is deadlocked. The forelady has said that she does not believe that with additional time they could arrive at a unanimous verdict.

The only other thing I think we could do is to have them come back, they have had a chance to think about it now, and ask her again, and if she again agrees that the jury could not, with additional time, arrive at the unanimous verdict, the court would then declare the jury hopelessly deadlocked and declare a mistrial.

All right, bring in the jury.

(Jury present.)

THE COURT: Madam Forelady, I would like to ask you again, now that you have had a chance to think about it some more, whether you think that with additional time the jurors would be able to come to a unanimous verdict with respect to Mr. Rodman.

THE FORELADY: No, your Honor.

THE COURT: All right. The court wishes to thank the members of the jury for their service in this case and the jury is dismissed now with thanks of the court. The court will declare a mistrial as to Mr. Rodman, and the jury is dismissed.

The clerk has your certificates of service so you do not have to report again to room 109. They will be given out by the marshal to you in the jury room. Thank you very much.

(Jury excused.)

THE COURT: With respect to Mr. Zammas, the day of sentence will be Monday, September 22nd, at 11 o'clock. Presentence report will be required.

And with respect to Mr. Rodman, the government will have to let me know whether it intends to try the case again.

MR. LOWE: Your Honor, I can state for the record at this time the government definitely intends to try the case against Mr. Rodman.

THE COURT: I will notify the Assignment Committee. I will send them a notice.

MR. LOWE: Mr. Zammas is on an unsecured personal recognizance bond, the amount I can't recall,

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but the government has no objection to continuing that.

THE COURT: What is the amount, Mr. Entin?

MR. ENTIN: $25,000, your Honor.

THE COURT: The present bail status will be continued until the day of sentence, September 22nd, Monday, 11 o'clock.

You will have to check with my chambers as to the courtroom.

MR. ENTIN: Your Honor, may I beg the court one indulgence. Would it be possible to report at 2 o'clock in the afternoon that day rather than 11 in the morning. We would, myself and Mr. Zammas, be flying from Miami and it would make it a little more convenient.

THE COURT: All right. We will say 2 o'clock.

MR. ENTIN: Thank you, your Honor.

THE COURT: Thank you, gentlemen.

(Adjourned for sentencing to September 22, 1975, at 2:00 p.m.)

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

-against- : 74 Cr. 987

THOMAS ZAMMAS, :

Defendant. :

----------x

September 29, 1975
11:00 a.m.

BEFORE:

HONORABLE CONSTANCE BAKER MOTLEY,

DISTRICT JUDGE

APPEARANCES:

PAUL J. CURRAN, ESQ.
United States Attorney for the
Southern District of New York
BY: JOHN A. LOWE: Assistant United States Attorney

RICHARD H. WYNN, ESQ.
230 Park Avenue,
New YMrk, New York 10017
Attorney for the defendant.

* * *

CLERK: United States of America versus Thomas Zammas. Government ready?

MR. LOWE: Government is ready.

MR. WYNN: Defendant is ready, but prior to sentence I am informed by Mr. Unterman, the gentleman who tried this case, on August 11th, 12th or 13th, he submitted a motion to your Honor for a new trial which has not yet been decided and I was wondering whether your Honor had decision on that motion.

THE COURT: Just a moment, let me check the file. Yes, the back of the motion shows it was denied on August 19th.

MR. WYNN: Thank you, your Honor.

THE COURT: An order on the back of the motion. All right, at this time Mr. Wynn, is it?

MR. WYNN: Yes, your Honor.

THE COURT: The Court will give you an opportunity to say anything you wish on behalf of the defendant, Thomas Zammas, after which the Court will address the defendant separately.

MR. WYNN: Thank you, your Honor.

I know that your Honor has a full and complete probation report. Your Honor was kind enough to permit me to read it last Friday. Along with that probation report

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is a statement from Mr. Zammas himself regarding his particular participation in the crime for which he was convicted after a trial before your Honor.

Mr. Zammas said in that report to your Honor and at all times that at the time he made the payment in question he did not believe he had violated any federal law. Mr. Zammas never denied making the payment and as the report indicates, he relied on the advice of his attorney whose opinion was that mere payment was not illegal under applicable federal law. The report makes clear, your Honor, that as a result of the incidents surrounding --

THE COURT: He relied on that advice at the time he made the payment.

MR. WYNN: No, not at the time he made the payment. I'm not saying that at all. I'm saying that when he discussed the facts of the case with his attorney, as this is clear in his own report, he indicates that he would have pleaded guilty if he felt that he had committed a crime because he did not deny the underlying fact that he had made the payment and has never denied the fact that he did pay the $15,000 in question.

The report also indicates that as a result of a great many things that happened around this time, Mr. Zammas was left with a tax liability to the United States government

of some $200,000, judgments totaling $534,000 and has pending lawsuits totaling $296,000. He had brought a civil suit against one of his co-defendants, Mr. William Rodman, for some $800,000, but Mr. Zammas was forced to give up that civil suit due to his lack of funds at the time.

The probation report indicates that Mr. Zammas has no prior criminal record. He is presently living at home with his parents while paying child support since he was separated from his wife in Feburary of 1973. It is Mr. Zammas' contention that this marital discourse stemmed from his legal and financial problems at the time.

As page 4 of the report indicates, your Honor, Mr. Zammas is a concerned and devoted father and a genuinely responsible individual. I would ask your Honor to be as lenient as you could with this defendant under all of the circumstances of the case. Thank you.

THE COURT: All right, does the Government have anything to say at this time before I address the defendant?

MR. LOWE: Well your Honor is of course completely familiar with the facts of the instant case and your Honor is also familiar with the developments in Mr. Zammas' situation subject to his conviction based on the Government's letter of last week which -- concerning which your Honor met with myself and Mr. Wynn on Friday. Unless your Honor --

THE COURT: Well that was a request to adjourn the sentence indefinitely; is that right?

MR. LOWE: That's right, your Honor.

THE COURT: The Court denied that application.

MR. LOWE: I was eluding to the factual statements made at the time.

THE COURT: I don't think that was on the record. In response to your letter of September 25th, 1975 to me requesting an indefinite postponement of sentence for Mr. Zammas and that application was denied.

MR. LOWE: The Government has nothing to add to anything that is already before your Honor unless Your Honor has some question that your Honor would like the Government to address itself to.

THE COURT: While we are on this, with respect to the co-defendant Rodman, the Court indicated to you on Friday offthe record that that case would be sent to the Assignment Committee for reassignment, since Mr. Rodman's case resulted in a hung jury.

Now is the Government planning to try that case soon?

MR. LOWE: The Government will be prepared to try that case on a few days notice, your Honor. At any time from today forward. In fact, your Honor, the Government would

appreciate the opportunity to try it as soon as possible.

THE COURT: All right Mr. Zammas, you are now before the Court for sentence having been convicted after a trial by jury of 12 counts of indictment, 74 Criminal 987.

In counts 1 through 6 you were charged with a violation of Title 18, United States Code Section 1341. Now, for each of these offenses, the law provides for a term of imprisonment up to five years and in addition a fine up to $1,000. In counts 7 through 12 you were charged with the violation of Title 15, United States Code Section 77QB. Now, for each of these offenses the law provides a term of imprisonment up to 5 years and in addition a fine up to $5,000.

Do you wish to make a statement in your own behalf at this time or to say anything as to why these maximum penalties provided by the law should not be imposed in your case?

THE DEFENDANT: No, your Honor.

THE COURT: Do you own a house in Florida, Mr. Zammas?

A No, ma'am.

THE COURT: Pardon me?

THE DEFENDANT: No, ma'am.

THE COURT: Who owns a house in which your wife

and children live?

THE DEFENDANT: My wife does.

THE COURT: Now this understanding that Mr. Zammas has with the Government, Mr. Lowe?

MR. LOWE: Yes, your Honor.

THE COURT: Does that include an agreement on his part to testify for the Government in the case of Rodman?

MR. LOWE: Yes, your Honor. It includes an obligation on his part to testify in any and all cases in which we request him to do so and that would include the retrial of the case against his co-defendant, William Rodman.

THE COURT: All right, it's the judgment of the Court that the defendant be sentenced to a term of 18 months on each count concurrently. The defendant is remanded.

MR. WYNN: Your Honor, on the question of remand, as your Honor notes from my prior statement, the defendant's position in this case has always been a legal issue, that is that the payments under the facts and circumstances in this case were not illegal under the applicable federal law. The defendant is currently on a bail of $25,000 personal recognizance bond and I would ask that the bail be continued pending appeal.

THE COURT: His claim was what?

MR. WYNN: That he admitted the payments. He never disputed that he made the payments because that under the facts of the case the payment of the $15,000 was not a crime to the applicable federal law. That is a legal question that as I was informed by the counsel who tried the case. As your Honor knows, I didn't try the case. There is no prior case law on this particular subject, the question whether 1577QB was violated under the facts and circumstances has been Mr. Zammas' defense from the very beginning. It's always been his contention to appeal any conviction as a result of the trial that he may have had. He is currently on $25,000 personal recognizance bond. He intends to appeal his conviction in this particular case and I would ask your Honor continue him on bond pending appeal.

THE COURT: All right, Mr. Zammas, as your lawyer has indicated you have a right to appeal your conviction and the Court has a duty to advise you of your right to appeal your conviction. The Court also has a duty to advise you that if you can not afford an attorney to take an appeal for you, the Court will appoint one for you; do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: And the application for stay of the judgment pending appeal is granted.

Now Mr. Wynn, that means that that appeal has to be taken promptly.

MR. WYNN: Yes, ma'am, it will be.

THE COURT: If that appeal is not filed within the time allowed by the rules, the stay is going to be revoked.

MR. WYNN: I understand that.

THE COURT: Because as I indicated on Friday, it is not my understanding that a defendant can be at liberty, after he has been sentenced, indefinitely on the ground that he is cooperating with the Government in other cases and that applies to the time he has with respect to taking an appeal. I have had cases where defendants cooperating with the Government, even after their convictions had been affirmed in the Court of Appeals and their petition for certiorari has been denied by the Supreme Court and they were still at liberty. That is not going to happen in this case. He is going to take a prompt appeal and when his conviction is affirmed he has to surrender; is that clear?

MR. WYNN: Yes.

THE COURT: If there is a petition for certiorari, if the petition for certiorari is denied and a stay and the Court of Appeals acts on that in his appeal, he is to surrender immediately after pending denial for petition to certiorari,

he is not at liberty when he feels like coming in or when the Government feels like bringing him in on the ground that he is cooperating with the Government.

MR. WYNN: I understand that clearly. That you very much.

* * *

A 202 Affidavit of Personal Service of Papers — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

- against -

THOMAS ZAMMAS, Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 310 W. 146th St., New York, N.Y.

That on the 26th *day of* November 75 *at* 1 St. Andrews Plaza, New York, N.Y.

deponent served the annexed appendix *upon* THOMAS J. CAHILL

the Attorney *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 26th *day of* November *19*75

Robert T. Brin

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31 0[illegible]
Qualified in New [illegible]
Commission Expires March [illegible]